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No. 89-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

JACK McCORMICK,
Warden of the Montana State Prison,

Petitioner,

v.

BERNARD J. FITZPATRICK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals exceed its proper scope of review under 28 U.S.C. § 2254(d) by ignoring state court findings of fact and holding that the respondent had established that his trial attorney actively represented conflicting interests and the conflict adversely affected the attorney's performance?

2. May the respondent, who was twice convicted of deliberate homicide and sentenced to 100 years' imprisonment after his first trial, but to death after retrial, have his death sentence struck down on habeas corpus review as violating the double jeopardy clause under the rule adopted in *Bullington v. Missouri*, 451 U.S. 430 (1981)?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jack McCormick, warden of the Montana State Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 7, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 869 F.2d 1247 (9th Cir. 1989), is annexed as Appendix A. The opinion of the United States District Court for the District

of Montana, which is unreported, is annexed as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 7, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

1. The Fifth Amendment to the United States Constitution:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .

2. The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

An understanding of the issues requires a somewhat detailed description of the facts surrounding the conviction of Bernard Fitzpatrick and subsequent collateral review proceedings.

I. Evidence Leading to Fitzpatrick's Conviction.

In October 1975, Fitzpatrick and three codefendants were tried jointly on charges stemming from the kidnapping, robbery, and murder of 19-year-old Monte Dyckman. Fitzpatrick and a codefendant, Gary Radi, were convicted of deliberate homicide, aggravated kidnapping, and robbery. Fitzpatrick was sentenced to 100 years for deliberate homicide, death for aggravated kidnapping, and 100 years for robbery as a persistent felony offender. Codefendants Paul Bad Horse and Travis Holliday were acquitted of deliberate homicide and aggravated kidnapping, but convicted of robbery. A fifth codefendant, Edwin Bushman, was granted immunity and testified for the State.

On October 19, 1977, the Montana Supreme Court held that it was error to try the defendants jointly. It reversed the convictions and remanded for separate new trials. *State v. Fitzpatrick*, 174 Mont. 174, 569 P.2d 383 (1977).

Forty-two witnesses testified at Fitzpatrick's second trial in 1978. Twenty-eight were called by the State. Seventeen were called or recalled by the defense. Testimony established the following:

The body of Monte Dyckman, an employee of the Safeway store in Hardin, Montana, was discovered near the Toluca Interchange in Big Horn County in the early morning of April 6, 1975. (Trial Transcript [hereinafter "T.T."] 23-29, 34.) He was lying in his vehicle with his hands tied behind his back. (T.T. 29, 66-67.) He had been killed by two gunshots to the head fired from point-blank range. (T.T. 72-78.) At the scene, investigators found four

.45-caliber shell casings, two in Dyckman's vehicle and two outside his vehicle. (T.T. 55, 90-91, 96-99, 110-11, 298, 304, 306-07, 345-46.) They also found two .45-caliber slugs, one under the driver's seat and one in the ground. (T.T. 95, 106, 109-10, 344.)

Dyckman's murder was the result of a conspiracy to rob the Safeway store. Fitzpatrick, Gary Radi, Paul Bad Horse, Travis Holliday, and Edwin Bushman were the conspirators. Bushman was granted immunity from prosecution in exchange for his testimony. (T.T. 121.) He testified to the details of the conspiracy and the subsequent execution of the plan.

He described the plan to rob the store made by the five conspirators in a Billings bar on the afternoon of April 5, 1975. (T.T. 126-30.) After the discussion, Bushman and Bad Horse left the bar with Fitzpatrick, Holliday, and a young woman. (T.T. 130.) At Holliday's request, two teenage girls were picked up at a Billings residence. (T.T. 130-32, 431, 472.) Fitzpatrick gave directions to another residence, went inside, and soon came out placing what appeared to be a gun under his belt. (T.T. 132-33.) The four men and three girls then went to Gary Radi's home. (T.T. 133, 431-32, 472.) At Radi's house, Fitzpatrick showed a .45-caliber automatic pistol to the others. (T.T. 137-38, 202-04.)

The conspirators then drove to Hardin. Fitzpatrick and Radi rode to Hardin in Radi's midnight-blue Pontiac. (T.T. 143-47, 953.) Bushman, Bad Horse, Holliday, and two teenage girls, Iva Lee Finch and Cindy Morgan, traveled to Hardin in the car Bushman was driving. (T.T. 143, 435-38, 477.) Bushman, Morgan, and Finch all testified

that Radi's car passed them on the way to Hardin. (T.T. 144, 208, 437, 477.) Morgan and Finch also testified that they saw Radi's car in Hardin that night. (T.T. 438, 478.)

After dropping the girls off, Fitzpatrick, Radi, Bad Horse, Holliday, and Bushman met in Hardin at about 8 p.m. (T.T. 144, 147-48.) They staked out the Safeway store with Radi and Fitzpatrick in Radi's car and Bad Horse, Holliday, and Bushman in Bushman's car. (T.T. 155, 159-60.) A witness noticed a dark-colored car similar to Radi's, with two males inside, parked outside the Safeway store at approximately 9:15 p.m., and again when he left the store 45 minutes later. (T.T. 504.) He testified he believed Radi was one of the persons in the car. (T.T. 510.)

At closing time the store manager and Monte Dyckman left the store. Radi and Fitzpatrick followed the store manager with the understanding that if they lost him, they would proceed to the drive-in bank and intercept the Safeway deposit there. (T.T. 163-64.) The manager went straight home. (T.T. 617.) Bushman, Bad Horse, and Holliday followed Dyckman until Dyckman turned into the drive-in bank where they believed Radi and Fitzpatrick were waiting. (T.T. 163-69.) Bushman, Bad Horse, and Holliday then abandoned the chase, went to some local bars and picked up the teenage girls, later returning to Billings. (T.T. 169-75, 388-90, 439-41, 479-80.)

At around 10 p.m., a witness observed Dyckman's vehicle traveling down a Hardin street. Two persons were in the truck, a driver and a passenger slumped against the passenger door. (T.T. 671.) Following close behind Dyckman's vehicle was a dark blue car. (T.T. 670-72.)

Shortly thereafter, a man driving on the interstate highway outside Hardin was passed by a vehicle he recognized as belonging to Monte Dyckman and a dark-colored car following it. (T.T. 704-06.) The vehicles turned off the highway and stopped near a section of the highway known as the Toluca interchange. (T.T. 706.)

Bushman, Holliday, Bad Horse, Iva Lee Finch, and Cindy Morgan arrived at Radi's house in Billings at approximately 2:30 a.m. on April 6, 1975. Fitzpatrick was not present. Radi, Holliday, Bad Horse, and Bushman met in a bedroom of the house. (T.T. 176-78.) Bushman testified Radi explained that Fitzpatrick grew tired of waiting for the store employee at the bank and stepped out of the car pulling off his mask. About that time, Dyckman arrived and was seized by Radi and Fitzpatrick. (T.T. 259.) Radi told the others, "Fritz [Fitzpatrick] didn't have to shoot the kid. Boom, boom, he shot his head off."[1] (T.T. 259.) Radi also discussed the amount of money taken and mentioned that Fitzpatrick had shot a hole in the windshield of Radi's car. (T.T. 260-61.) Finch and Morgan rode in Radi's car after the meeting at Radi's house ended, and they both testified that the windshield had a hole in it. (T.T. 442-43, 481.)

Fitzpatrick's girlfriend, Christine Fetters, testified that Fitzpatrick acquired a gun in Butte, Montana, and took it with him to Billings on April 4, 1975, the day before the murder. (T.T. 526-29.) She didn't see him from the evening of April 4, 1975, until the morning of April 6,

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[1] Christine Fetters, Fitzpatrick's girlfriend, testified that Radi made a similar statement in her presence. T.T. 993-94, 1029.

1975. At 5 a.m. the day after the homicide, Fitzpatrick called Fetters and told her to meet him at the Billings bus station. (T.T. 532.) They met at the station around 6 a.m. and rode the bus back to Butte. (T.T. 533.) In Butte, Fitzpatrick registered in a motel under a fictitious name. (T.T. 534.) On April 7, 1975, he and Fetters bought a car and left Montana. (T.T. 537-40.) They returned to Billings in mid-April. (T.T. 541.) They then returned to Butte, and Fitzpatrick retrieved the gun. He took it to Billings where Radi told him "he had better get rid of it, it was hot." (T.T. 541-44, 579.) With Fetters along, Fitzpatrick drove to the outskirts of Billings. (T.T. 545.) He stopped, took the gun, and disappeared for 10 or 15 minutes. (T.T. 546.) He returned without the gun and with muddy hands. (T.T. 546.) Fitzpatrick later told Radi it was buried. (T.T. 548.)

Fetters' testimony also established that Fitzpatrick, who had been released from prison only a week before the Dyckman murder and who was not employed, spent over $3,000 before his arrest. That amount coincided with Fitzpatrick's share of the money stolen.

Radi was arrested on June 27, 1975. (T.T. 274.) His car was searched and a shell casing was recovered from under the back seat. (T.T. 275-78, 289.) The four shell casings found at the scene of the Dyckman homicide and the shell casing found in Radi's car were fired by the same weapon. (T.T. 360-61, 379, 831, 849.)

Radi and Fitzpatrick both testified that they were together on the evening of April 5, 1975, and the early morning hours of April 6, 1975, but they denied being in Hardin. (T.T. 908-09, 912-13, 1054-58.)

Fitzpatrick was again convicted by a jury of deliberate homicide, aggravated kidnapping, and robbery. On April 5, 1978, he was sentenced to death for the crime of deliberate homicide, death for aggravated kidnapping, and 100 years' imprisonment for robbery. The district court's findings, conclusions, judgment and order are annexed as Appendix C.

The Montana Supreme Court affirmed Fitzpatrick's convictions and sentences. *State v. Fitzpatrick,* 186 Mont. 187, 606 P.2d 1343 (1980), annexed as Appendix D. Fitzpatrick filed two unsuccessful petitions for writ of certiorari with the United States Supreme Court. *Fitzpatrick v. Montana,* 449 U.S 891 (1980); *Fitzpatrick v. Sentence Review Division,* 449 U.S. 891 (1980).

II. Collateral Review Proceedings

On November 6, 1980, Fitzpatrick filed a state post-conviction petition which was dismissed. On appeal, the Montana Supreme Court reversed the dismissal in part, remanding the case to the state district court for an evidentiary hearing on Fitzpatrick's ineffective assistance of counsel claim. *Fitzpatrick v. State,* ___ Mont. ___, 638 P.2d 1002 (1981). The pertinent testimony of John Adams Jr., given at the five-day postconviction hearing on ineffective assistance of counsel, is annexed as Appendix E.

During the 1975 joint trial of Fitzpatrick, Radi, Bad Horse, and Holliday, John Adams Jr. represented Paul Bad Horse. Defense attorneys for the four defendants worked together in defending their clients. App. 155-56, 173-76. At the conclusion of the State's case-in-chief, all of the defendants rested without offering evidence. While

Fitzpatrick was convicted of deliberate homicide, aggravated kidnapping, and robbery, Bad Horse was acquitted of deliberate homicide and aggravated kidnapping, but convicted of robbery. *See State v. Fitzpatrick*, 174 Mont. 174, 569 P.2d 383 (1977).

After his representation of Bad Horse had ended, Adams was, in November 1977, appointed to represent Fitzpatrick in his second trial on the charges. The State objected to Adams' appointment because Adams had previously represented a codefendant. App. 180. Fitzpatrick objected to Adams' appointment because of Adams' heavy caseload as a public defender. (T.T. 1336-37.) A hearing was held on whether or not new counsel should be appointed (without specific mention of a potential conflict). *Id.* Fitzpatrick informed the court that he was satisfied with Adams' work and wanted to withdraw his motion for new counsel. *Id.* Adams was retained as Fitzpatrick's attorney. *Id.*

Fitzpatrick's main defense was alibi. During his examination of witnesses, Adams also attempted to shift the focus and suggest the crime was committed by others, including Bushman and Bad Horse. During closing, Adams argued to the jury that Bushman and his companions could have committed the crimes. (T.T. 1276, 1281, 1295-1300.) Bad Horse did not testify at trial.

At the post-conviction hearing, Fitzpatrick raised several questions concerning a statement by Iva Lee Finch he believes implicated Bad Horse. The pertinent part of her statement is annexed as Appendix G. At the hearing, Adams did not recall the Finch statement, and disagreed with Fitzpatrick as to its significance. App. 158,

163-64, 168. Adams testified there was no conflict of interest. App. 178.

Following the five-day evidentiary hearing, the state court issued findings, conclusions, and an order, annexed as Appendix H, dismissing Fitzpatrick's claims. The court found that there was no conflict of interest, and rejected Fitzpatrick's claim concerning the significance of the Finch statement. App. 221-23. The court also noted that the evidence presented at the post-conviction hearing indicated Fitzpatrick had wanted to target Bushman and another uncharged individual as the culprits, not Bad Horse. App. 223. The Montana Supreme Court affirmed. *Fitzpatrick v. State*, 206 Mont. 205, 671 P.2d 1 (1983), annexed as Appendix I.

On December 8, 1983, petitioner filed a petition for writ of habeas corpus in United States District Court. Both the State and Fitzpatrick moved for summary judgment. On April 28, 1987, the district court granted the State's motion for summary judgment and denied Fitzpatrick's.

Fitzpatrick appealed to the United States Court of Appeals for the Ninth Circuit. On March 7, 1989, the Court of Appeals reversed the district court without making a determination of all the issues raised. The court held that Fitzpatrick was denied effective assistance of counsel and that Fitzpatrick's sentence of death for deliberate homicide subjected him to double jeopardy in violation of the Fifth Amendment. The court ordered the case remanded to the district court with the direction that it issue a writ on all three charges and determine a reasonable time in which to retry Fitzpatrick.

REASONS FOR GRANTING THE WRIT

I. IN MAKING THE DECISION BELOW ON THE CONFLICT ISSUE, THE NINTH CIRCUIT EXCEEDED ITS PROPER SCOPE OF REVIEW AND ITS DECISION CONFLICTS WITH OPINIONS OF THIS COURT.

The state district court, the Montana Supreme Court, and the United States District Court for the District of Montana all found that Adams, Fitzpatrick's attorney at his second trial, labored under no conflict of interest when he represented Fitzpatrick. *See* App. 33, 221-23, 251-52. The Ninth Circuit's contrary holding that Adams actively represented conflicting interests and the conflict adversely affected his performance, resulted from a disregard of the factual findings of the state court and a misapplication of the legal standards set forth in *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114 (1987), and *Cuyler v. Sullivan*, 446 U.S. 335 (1980). The opinion of the Court of Appeals conflicts with the reasoning set forth in those opinions.

The Court of Appeals found that Adams actively represented conflicting interests because "Fitzpatrick's defense was that he did not commit the crimes; rather Paul Bad Horse, Bushman, and Holliday did. Thus, Fitzpatrick's defense theory was in direct conflict with that of Bad Horse." App. 11.

In making this finding, the Ninth Circuit disregarded factual findings made by the state district court following a five-day evidentiary hearing. The state court found:

> As a result of the first trial, Bad Horse had been acquitted of the charges of deliberate homicide and

> aggravated kidnapping, so that at the time of petitioner's trial in 1978, there was no basis for any possible conflict of interest as to petitioner's position with respect to such charges. As to the remaining charge still outstanding against Bad Horse, that of robbery, all of the evidence developed at the first trial, and all of the investigation conducted thereafter, including the basis for the charges then pending against Bad Horse, cast him in the role of a person accountable for robbery by reason of his conspiring and his aiding and abetting its accomplishment. The petitioner's voluminous notes prepared on the basis of the evidence presented in the first trial, plus petitioner's additional thoughts and suggestions, which are included in the material attached as an exhibit to his pre-evidentiary hearing deposition, taken February 17th, 1982, and also admitted into evidence at the hearing as State's Exh. 11, failed to suggest any basis whatever for a conflict of interest between petitioner and Bad Horse. Except for the conspiracy aspect, the parts played by each were physically separated with respect to petitioner's alleged activities.
>
> . . . .
>
> As a review of the total evidence will reveal, Raleigh Kraft, when employed by Safeway, had talked about stealing Safeway bank deposits, and he admitted to this. Also, in addition to the indication that Holliday had given Bushman a gun, when Bushman's car was later searched after the crime, a bloody handkerchief, boots with blood on them and a ski mask were found.
>
> As a result, and as petitioner's notes in State's Exh. 11 show, petitioner's wish was to target Bushman and Kraft as the culprits of the crime in lieu of himself. This was the course pursued by his counsel.

App. 222-23. While the ultimate issue of whether there was an actual conflict is a mixed question of law and fact subject to *de novo* review, these findings of historical fact are entitled to a presumption of correctness under 28

U.S.C. § 2254(d). *Cuyler v. Sullivan*, 446 U.S. at 341-42. The Court of Appeals clearly exceeded its proper scope of review when it found that Fitzpatrick's defense theory was that Paul Bad Horse committed the crimes and that their defenses were in direct conflict.

A review of the record, moreover, fully supports the state court findings. Fitzpatrick's main defense at trial was alibi. A secondary defense tactic was an attempt to shift the focus and implicate the prosecution's star witness, Edwin Bushman, Raleigh Kraft, and others. App. 223. By contrast, Bad Horse's "defense" was never presented by Adams at the first trial because the defendants rested their case without presenting a defense. At the post-conviction hearing, Adams testified that Bad Horse's defense would have been that he was elsewhere in Hardin when the crimes occurred and knew nothing about them. App. 156. Essentially, both Fitzpatrick and Bad Horse denied involvement in the crimes or knowledge of them. Thus, not only were their defense theories not in direct conflict, but also no probative evidence exist to establish that Adams' prior representation of Bad Horse either practically or ethically hamstrung his ability to vigorously defend Fitzpatrick.

Substantial evidence of Bad Horse's involvement in the conspiracy to rob the store was presented to the jury in Fitzpatrick's trial. Bad Horse had already been acquitted of aggravated kidnapping and deliberate homicide and could not be retried on those charges. Thus, Adams had no reason to protect Bad Horse regarding those charges at Fitzpatrick's second trial. Indeed, at the post-conviction hearing, Adams, an experienced criminal law attorney, testified that there was no conflict of interest.

App. 178. This court has recognized that, even in cases of joint representation, an attorney representing two defendants is in the best position professionally and ethically to determine when a conflict exists. *Burger v. Kemp*, 483 U.S. at ___, 107 S. Ct. at 3120; *Cuyler*, 446 U.S. at 347.

The single piece of evidence relied on by the Court of Appeals to show an actual conflict adversely affecting Adams' performance is a witness statement given to police by Iva Lee Finch on April 24, 1975, three years before Fitzpatrick's retrial. Finch was one of the teenagers who rode to Hardin with Bushman, Holliday, and Bad Horse. While she was riding back to Billings with them after the crime, she overheard a conversation about Bad Horse hurting someone, which he should not have done. *See* App. 182-86. This evidence was not presented at trial. The Court of Appeals held that Adams' failure to elicit testimony from Finch regarding the conversation proved he was laboring under a conflict and his performance was adversely affected by a conflict of interest.

Ignoring both the state court's findings and Adams' factual assessment of the alleged conflict, the Court of Appeals chose to rely on selected quotations from Adams' testimony at the post-conviction hearing on ineffective assistance of counsel to support its finding of conflict. App. 12-14. The fact, however, is that at the post-conviction hearing, Adams did not specifically recall having seen the Finch statement. App. 158. He further testified:

Q. Do you recall whether this statement of Iva Lee Finch was available for you in the Fitzpatrick trial in 1978?

A. I do not recall.

Q. Would you have felt free at that time, given your previous relationship with Paul Bad Horse, to have explored a defense which would have implicated him as the guilty party in the Monte Dyckman homicide?

A. That opportunity was afforded the state and I'm sure they did not try to conceal any evidence and I would not have explored it for the reason it would have been a lie.

Q. Would you have felt free had you not believed it to be a lie, given your previous relationship with Mr. Bad Horse, to have explored it?

A. Yes.

Q. Did you explore it?

A. No. For the reasons that I gave. May I speak further?

Q. Yes.

A. Paul Bad Horse at all times was in downtown Hardin. So, also was [sic] the girls. Now, they visited various and sundry bars there in Hardin, Montana, during the time that the alleged robbery was occurring, making known their presence. Paul Bad Horse may have had an altercation. He was pugilistic at one of those bars and that may have been what Mr. Travis Holliday was referring to.

Q. Again calling your attention to Pages –

A. There is nothing that indicates that that has reference to the crime or the alleged crime. You're inferring that it does. If you can show me where it does, I will tell you why I did not.

App. 163-64.

Following the evidentiary hearing, the state court found regarding the Finch statement:

> When traveling in Bushman's automobile on the way back to Billings, [Finch] overheard Holliday tell Bad Horse, "You shouldn't have did something," to which Bad Horse replied, "Oh, well, I had to do it," whereupon all of the other car occupants, being four in number, laughed. . . . Defense counsel, with his knowledge of the case, interpreted this exchange as a reference to Bad Horse's pugilistic nature – he being a trophy-winning fighter, whose trophies were on display in the bar run by Raleigh Kraft's father. Iva Lee Finch, in her statement, had made the same assumption.

App. 222-23.

In summary, at the time of the post-conviction hearing, Adams did not recall the statement and, further, he did not believe it was significant. Adams also indicated he would not lie to the jury. He noted that Bad Horse had been seen in bars in Hardin at the time the crimes were being committed. Adams' refusal to pursue a defense tactic he reasonably believed was untruthful and could be disproven does not equate with a conflict adversely affecting his performance; it was instead an ethical and rational decision concerning appropriate trial strategy.

Determining that there was an actual conflict of interest requires the attribution of Adams' motivation for not utilizing the Finch statement to a divided loyalty arising from his prior representation of Bad Horse. *Burger v. Kemp*, 483 U.S. at ___, 107 S. Ct. at 3121. The state district court credited Adams' testimony to the contrary and agreed with his assessment of the statement. App. 222-23. The Court of Appeals improperly ignored these findings and in their place substituted speculation which is not supported by the record to find that Adams actively

represented conflicting interests and the conflict adversely affected his performance.

This blatant disregard of the presumption of correctness of state court factual findings runs directly contrary to 28 U.S.C. § 2254(d) and warrants review.

II. THE RULE ADOPTED IN *BULLINGTON V. MISSOURI*, 451 U.S. 430 (1981), IS NOT APPLICABLE TO FITZPATRICK'S SENTENCE OF DEATH FOR DELIBERATE HOMICIDE.

A. Pursuant to *Teague v. Lane*, ___ U.S. ___, 109 S. Ct. 1060, 103 L. Ed. 2d 335 (1989), the Rule Adopted By This Court in *Bullington* Should Not Have Been Applied by the Court of Appeals to Fitzpatrick's Sentence of Death for Deliberate Homicide Because It Was a New Rule Adopted After the Direct Review of His Conviction and Sentence Was Completed.

When Fitzpatrick was first tried and convicted of deliberate homicide, aggravated kidnapping and robbery, he was sentenced to 100 years' imprisonment for the deliberate homicide conviction. Following his retrial, he was sentenced to death for deliberate homicide. The second judge cited "objective information concerning identifiable conduct on the part of the defendant justifying an increase in the severity of sentence for this offense" appearing "through evidence adduced during the second trial and subsequent to the original sentencing." App. 55. Fitzpatrick challenged this second death sentence as violating double jeopardy but it was upheld by the Montana Supreme Court in *State v. Fitzpatrick*, 186 Mont. 187,

210-15, 606 P.2d 1343, 1356-58 (1980), App. 85-90, because it complied with the constitutional rules then in effect.

Direct review of Fitzpatrick's case was completed in 1980. The following year, in *Bullington v. Missouri*, 451 U.S. 430 (1981), this Court held in a direct appeal proceeding that, because under Missouri law the sentencing proceeding at the defendant's trial was like a trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury was available to him, with respect to the death penalty, at his retrial. Prior to *Bullington*, this Court had concluded that the Double Jeopardy Clause imposed no absolute prohibition against the imposition of a harsher sentence at retrial after a defendant had successfully had his original conviction set aside. *See North Carolina v. Pearce*, 395 U.S. 711 (1969). *See also United States v. Di Francesco*, 449 U.S. 117, 133, 137-38 (1980); *Stroud v. United States*, 251 U.S. 15 (1919). Thus, in *Bullington* this Court adopted a new rule which was not dictated by precedent existing at the time the defendant's conviction became final. *See Teague v. Lane*, ___ U.S. ___, 109 S. Ct. 1060, 1070, 103 L. Ed. 2d 334, 349 (1989). The *Bullington* rule was later held applicable to the Arizona death penalty scheme, which is similar to Montana's, in *Arizona v. Rumsey*, 467 U.S. 203 (1984).

In *Teague v. Lane*, 109 S. Ct. at 1074, 103 L. Ed. 2d at 355, the Court recognized that habeas corpus is a collateral remedy providing an avenue for upsetting otherwise final judgments and "application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system."

A plurality of the Court held that, unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to a case which is on collateral review if direct review of the case was completed before the new rule was announced. 109 S. Ct. at 1075, 1078, 103 L. Ed. 2d at 356, 360.

The new rule articulated in *Bullington* does not fall within the two exceptions discussed in *Teague*. It does not place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, and it is not a watershed rule implicating the fundamental fairness of the trial. *See* 109 S. Ct. at 1075-77, 103 L. Ed. 2d at 355-58. Therefore, the *Bullington* rule should not have been retroactively applied to Fitzpatrick's case on collateral review.

Because Teague was not under sentence of death, this Court specifically declined to express a view as to how the retroactivity approach adopted in *Teague* is to be applied in the capital sentencing context, but did note:

> We do, however, disagree with Justice STEVENS' suggestion that the finality concerns underlying Justice Harlan's approach to retroactivity are limited to "making convictions final," and are therefore "wholly inapplicable to the capital sentencing context." *Post*, at 1081, n.3. As we have often stated, a criminal judgment necessarily includes the sentence imposed upon the defendant. See generally *Flynt v. Ohio*, 451 U.S. 619, 620 (1981) (*per curiam*). Collateral challenges to the sentence in a capital case, like collateral challenges to the sentence in a noncapital case, delay the enforcement of the judgment at issue and decrease the possibility that "there will at some point be the certainty that comes with an end to litigation." *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan,

J., dissenting). Cf. U.S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 1987, at 9 (1988) (for the ten-year period from 1977-1987, the average elapsed time from the imposition of a capital sentence to execution was 77 months) (Table 10).

109 S. Ct. at 1077 n.3, 103 L. Ed. 2d at 358 n.3. The petitioner submits that *Teague* should be applied in the capital sentencing context and will preclude application of *Bullington* and *Rumsey* to Fitzpatrick's sentence. This question is ripe for review.

B. Even If This Court Rejects the Petitioner's Argument That Teague Precludes Application of the Bullington Rule, the Court of Appeals Improperly Applied That Rule to Fitzpatrick.

Montana's capital sentencing procedure, while similar to the procedure discussed in *Arizona v. Rumsey, supra,* is distinguishable from the Missouri and Arizona schemes held to have all "the hallmarks of the trial on guilt or innocence." *Bullington,* 451 U.S. at 439. In Montana, like Arizona, the judge sentences the defendant. However, unlike the Missouri and Arizona sentencing schemes, the sentencer in Montana is not limited to only two alternatives, death or life imprisonment, but has wider discretion in imposing a sentence other than death. Rev. Codes Mont., 1947 § 95-2206.10 (1977). Additionally, the usual rules of evidence do not govern admission of evidence of aggravating circumstances. Rev. Codes Mont., 1947 § 95-2206.7 (1977). The Montana procedure is more in the nature of a true sentencing hearing rather than a trial on the issue of guilt or innocence, and the *Bullington* rule does not extend to Montana's procedure.

In *Rumsey*, this Court expressed its rationale for the decision:

> Application of the *Bullington* principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding – *whether death was the appropriate punishment for respondent's offense. The trial court entered findings denying the existence of each of the seven statutory aggravating circumstances, and as required by state law, the court then entered judgment in respondent's favor on the issue of death. That judgment, based on findings sufficient to establish legal entitlement to the life sentence, amounts to an acquittal on the merits and, as such, bars any retrial of the appropriateness of the death penalty.* [Emphasis added.]

Rumsey, 467 U.S. at 211.

Fitzpatrick was never "acquitt[ed] on the *merits* of the central issue in the proceeding [the first sentencing hearing] – whether death was the appropriate punishment for [Fitzpatrick's] offense." *Rumsey*, 467 U.S. at 211 (emphasis added). As noted by the second sentencing judge, the first judge never determined whether or not death was an "appropriate punishment" for the offense of deliberate homicide, due to his misgivings about the death penalty statute then in effect. App. 53. Thus, the rationale underlying the *Bullington* and *Rumsey* decisions is inapplicable to Fitzpatrick.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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June, 1989

APPENDIX A

Bernard J. FITZPATRICK,
Petitioner-Appellant,

v.

Jack McCORMICK,* Warden of the Montana State Prison, Respondent-Appellee.

No. 87-4027.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 12, 1988.

Decided March 7, 1989.

Petitioner sought habeas corpus relief following state court convictions which were affirmed by the Montana Supreme Court, 186 Mont. 187, 606 P.2d 1343, after an earlier reversal and remand, 174 Mont. 174, 178 Mont. 530, 569 P.2d 383. The United States District Court for the District of Montana, James F. Battin, Chief Judge, denied relief, and petitioner appealed. The Court of Appeals, Leavy, Circuit Judge, held that: (1) evidence showed that counsel's successive representation of petitioner at second trial, after representing codefendant in petitioner's first trial, was ineffective assistance of counsel, and (2) death sentence imposed at second trial for deliberate homicide placed petitioner, who was granted life sentence for same offense at first trial, in double jeopardy.

Reversed and remanded with direction.

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* Jack McCormick is substituted for his predecessor, Henry Risley, Warden of the Montana State Prison, pursuant to Fed.R.App.P. 43(c)(1).

Timothy K. Ford, Seattle, Wash., Michael D. Laurence, San Francisco, Cal., for petitioner-appellant.

Kathy Seeley, Asst. Atty. Gen., Helena, Mont., for respondent-appellee.

Appeal from the United States District Court for the District of Montana.

Before POOLE, CANBY and LEAVY, Circuit Judges.

LEAVY, Circuit Judge:

Bernard J. Fitzpatrick appeals the district court's denial of his petition for habeas corpus relief. Fitzpatrick was convicted by a Montana state court and sentenced to death for deliberate homicide, to death for aggravated kidnapping, and to 100 years for robbery. He raises numerous grounds on which he argues the district court should be reversed. We reverse the district court without making a determination of all issues raised.

PRIOR PROCEEDINGS

In October 1975, the petitioner, Bernard J. Fitzpatrick, and three codefendants were tried together on charges stemming from the kidnapping, robbery, and murder of a grocery store employee. Fitzpatrick and one codefendant, Gary Radi, were convicted of deliberate homicide, aggravated kidnapping, and robbery. They were each sentenced to 100 years imprisonment for the deliberate homicide, 100 years imprisonment for the robbery, and death by hanging for the aggravated kidnapping. Codefendants Paul Bad Horse and Travis Holliday were convicted of robbery and each sentenced to forty years in

prison. A fifth codefendant, Edwin Bushman, was granted immunity and testified for the state.

On October 19, 1977, the Montana Supreme Court held that it was prejudicial error to try the defendants jointly. It reversed the convictions and remanded for a separate new trial. *State v. Fitzpatrick*, 174 Mont. 174, 569 P.2d 383 (1977).

On retrial, Fitzpatrick was represented by John Adams, Jr., who had been counsel for Bad Horse at the first trial. Fitzpatrick's second trial was held in February 1978. In 1977, the Montana legislature repealed the deliberate homicide and aggravated kidnapping statutes under which Fitzpatrick was originally sentenced, and enacted the statutes under which he was sentenced at his second trial.[1] The jury found him guilty of deliberate

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[1] Fitzpatrick was originally sentenced to 100 years for deliberate homicide under Rev.Code Mont. § 94-5-105 (1947). That statute provided that the court should impose the death penalty on a person convicted of deliberate homicide if at least one of five statutory aggravating circumstances was present, "unless there are mitigating circumstances." Rev.Code Mont. § 94-5-105(1). Because the last phrase saved the deliberate homicide statute from being designated a mandatory death penalty statute, the Montana Supreme Court held the statute was constitutional. *State v. McKenzie*, 186 Mont. 481, 608 P.2d 428 (1980). *See State v. Fitzpatrick*, 186 Mont. 187, 229, 606 P.2d 1343, 1366 (1980). The statute under which Fitzpatrick was originally sentenced to death for aggravated kidnapping, Rev.Code Mont. § 94-5-304 (1947), mandates the death penalty if the victim is dead as a result of the kidnapping. The Montana Supreme Court declared it unconstitutional in *State v. Coleman*, 177 Mont. 1, 579 P.2d 732 (1978). In 1977 the Montana legislature enacted a new death penalty statute, Rev.Code Mont.

(Continued on following page)

homicide, aggravated kidnapping, and robbery.[2] The trial judge sentenced Fitzpatrick to death for the deliberate homicide, death for the aggravated kidnapping, and 100 years imprisonment for the robbery.

The Montana Supreme Court affirmed Fitzpatrick's convictions and sentences. *State v. Fitzpatrick*, 186 Mont. 187, 227, 606 P.2d 1343, 1365 (1980). Fitzpatrick filed two petitions for writ of certiorari to the United States Supreme Court, both of which were denied. *Fitzpatrick v. Montana*, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 118 (1980); *Fitzpatrick v. Sentence Review Div.*, 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 119 (1980).

On November 6, 1980, Fitzpatrick filed a state post-conviction petition which was dismissed. On appeal, the Montana Supreme Court reversed the dismissal in part, remanding Fitzpatrick's claim of ineffective assistance of counsel to the trial court for an evidentiary hearing. *Fitzpatrick v. State*, 638 P.2d 1002 (Mont.1981). Following a five day evidentiary hearing, the state trial court dismissed Fitzpatrick's claim. The Montana Supreme Court affirmed. *Fitzpatrick v. State*, 206 Mont. 205, 671 P.2d 1 (1983).

On December 8, 1983, Fitzpatrick filed a petition for a writ of habeas corpus in the United States District Court

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§§ 95-2206.6-.15, under which Fitzpatrick was sentenced at his second trial on both the deliberate homicide and aggravated kidnapping convictions. This is codified at Mont.Code Ann. §§ 46-18-301 to 46-18-310 (1985).

[2] On retrial, Bad Horse and Holliday were again convicted of robbery, and Radi was acquitted on all counts.

for the District of Montana, contending the writ should be granted on any one of numerous grounds, and requesting an evidentiary hearing. Both the State and Fitzpatrick moved for summary judgment.

The district court granted the state's motion for summary judgment and denied Fitzpatrick's. Fitzpatrick appealed.

FACTS

Fitzpatrick has at all times denied, and continues to deny, that he was involved in the robbery, kidnapping, or homicide. Following is a summary of the evidence which the Montana Supreme Court found sufficient to support the jury's verdict. *Fitzpatrick*, 186 Mont. at 190-93, 606 P.2d at 1345-47.

On April 5, 1975, Fitzpatrick and Holliday met Bad Horse and Bushman in a bar in Billings, Montana. While playing pool, the men discussed the feasibility of robbing the Safeway store in Hardin, Montana. Bushman drew lines on a napkin to represent the streets of Hardin, and others marked "X's" to show the location of the Safeway store and the bank. Bad Horse explained that an employee left the store at 10:00 p.m. each night and went to the local drive-in bank to make the night deposit.

The four men got into a car driven by Bushman, picked up three teenage girls, and went to a house in Billings at Fitzpatrick's direction. Fitzpatrick went into the residence and emerged soon thereafter, placing what appeared to be a gun under his belt. The car then proceeded to another residence in Billings, arriving at

approximately 6:00 p.m. Once inside, Fitzpatrick and Holliday introduced the others to the occupant of the house, Radi. At Radi's house, Fitzpatrick revealed the .45 caliber automatic handgun he had placed under his belt and cautioned that it was loaded.

It was planned that Fitzpatrick and Radi would take Radi's car (a metallic blue 1971 Pontiac) to Hardin, and Holliday, Bushman, and Bad Horse would travel in Bushman's car to Hardin. Two of the girls went in Bushman's car, the third stayed behind in Billings.

The cars arrived in Hardin at approximately 8:00 p.m. The girls were dropped off at the Becker Bar. The five men, all in Bushman's car, then drove past the drive-in bank and Safeway store.

They returned to the bar, where all the men except Bushman got in Radi's car and drove back to the Safeway store. Bushman returned the car he had been driving, which was his girlfriend's, to his own house in Hardin and picked up his own car, which had some rope in the trunk.

Bushman then met the others at the Safeway store. The rope was cut into two pieces and given to Fitzpatrick. The five men sat in their cars in front of the Safeway store until 10:00 p.m. The store closed, and Everett Stoltz, the store manager, came out and drove away. Fitzpatrick and Radi followed Stoltz in Radi's car. Monte Dyckman, the assistant store manager, also came out of the store at the time and drove away in a pickup. Bushman, Bad Horse, and Holliday followed Dyckman in Bushman's car.

Stoltz drove directly to his home. Fitzpatrick and Radi, realizing that Stoltz would not be making the night deposit, drove to the drive-in bank. Previously, the five men had agreed that should either car follow the wrong employee, that car would go to the bank and wait for the deposit to be made.

Monte Dyckman stopped at the post office before going to the bank. When those in Bushman's car saw Dyckman turn into the bank, Holliday said, "they've got him now." The Bushman car then dropped the pursuit. After spending some time drinking in Hardin, Bushman, Bad Horse, Holliday, and the two girls returned to Billings in Bushman's car.

At approximately 10:30 p.m., witnesses observed Dyckman's vehicle traveling at high speed down a street in Hardin. Two persons were in the truck, a driver and a passenger slumped against the door. Close behind was a dark blue car. Soon thereafter, a man traveling on the interstate highway was passed by a truck, which he recognized as Dyckman's, and a car following Dyckman's truck. Both vehicles were traveling at high speed. The vehicles turned off the highway at an area known as the Toluca interchange.

In the early morning of April 6, 1975, County Undersheriff John Fergusen found Dyckman's truck parked behind a gravel pile near the Toluca interchange. He discovered Dyckman lying on the passenger seat, dead. He had been shot in the head twice with a gun held less than six inches away. His hands were bound with rope found to be that from Bushman's car. Numerous footprints and tire tracks were in the area. A search revealed

two .45 caliber shell casings in Dyckman's truck and two outside his truck.

Bushman, Holliday, and Bad Horse arrived at Radi's house in Billings at approximately 2:30 a.m. on April 6. About the same time, Radi returned and the four men discussed the robbery. Fitzpatrick was not present. Bushman testified that Radi explained that Fitzpatrick had grown tired of waiting for the Safeway employee at the bank, and had stepped out of the car and taken off the mask he was wearing. Dyckman then pulled into the bank and stepped out of his car. Fitzpatrick and Radi seized him. When asked how much money was taken, Radi stated that the bag contained only $200 in cash and some food stamps and checks. Bushman testified that Radi then said, "Fritz didn't have to shoot the kid. Boom, boom, he shot his head off." "Fritz" was identified as being the defendant Fitzpatrick.

Fitzpatrick's girlfriend, Christine Fetters, testified that in the early morning of April 6, Fitzpatrick telephoned her and instructed her to buy two bus tickets to Butte, Montana, and to meet him at the bus depot. The couple traveled to Butte that morning by bus. Fitzpatrick was apprehended on June 3, 1975, in Spokane, Washington.

DISCUSSION

I. Whether Fitzpatrick was Denied Effective Assistance of Counsel

At his second trial, Fitzpatrick was represented by a court-appointed attorney, John Adams, Jr., who had

represented Paul Bad Horse at the first trial. Fitzpatrick claims he was denied constitutionally adequate representation because Adams had a conflict of interest when he represented him. Fitzpatrick claims that although he has at all times professed his innocence, Adams did not believe him. Fitzpatrick has maintained a defense that he did not kill Dyckman, but rather Bad Horse, Bushman, and Holliday did. He contends that because of Adams' prior representation of Bad Horse, Adams was convinced that Bad Horse did not kill Dyckman, and therefore Adams refused to offer this theory to the jury. Fitzpatrick alleges that Adams did not offer evidence, or pursue questioning, that would have cast Bad Horse as the possible killer.

Whether an attorney has rendered effective assistance of counsel is a mixed question of law and fact, reviewed de novo. *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir.1988). *See also Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The sixth amendment guarantees the right to counsel as part of a defendant's fundamental right to a fair trial. *Strickland*, 466 U.S. at 684-85, 104 S.Ct. at 2063. The right to counsel is the right to effective assistance of counsel. *Id.* at 686, 104 S.Ct. at 2063. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064.

The guarantee of effective assistance of counsel comprises two correlative rights: the right to reasonably

competent counsel and the right to counsel's undivided loyalty. *Mannhalt*, 847 F.2d at 579 (citations omitted). To establish a Sixth Amendment violation based on a conflict of interest, a defendant must show: (1) his attorney actively represented conflicting interests, and (2) an actual conflict of interest affected his attorney's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980); *Mannhalt*, 847 F.2d at 579-80. Unlike a challenge to counsel's competency, prejudice is presumed if the defendant makes such a showing. *Cuyler*, 446 U.S. at 349-50, 100 S.Ct. at 1719; *Mannhalt*, 847 F.2d at 580; *United States v. Crespo de Llano*, 838 F.2d 1006, 1013 (9th Cir.1987). Prejudice is presumed because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067.

Conflicts of interest can arise both in cases of simultaneous representation and successive representation, though it generally is more difficult to demonstrate an actual conflict resulting from successive representation. *Mannhalt*, 847 F.2d at 580. We have stated, in a civil case, that preservation of a proper attorney-client relationship requires "a rule that prevents attorneys from accepting representation adverse to a former client if the later case bears a substantial connection to the earlier one. . . . Substantiality is present if the factual contexts of the two representations are similar or related." *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir.1980) (citations omitted).

This rule is necessary because "[t]he mere possession of a former client's and codefendant's privileged communications poses the precise potential for conflict." *United States v. Wheat*, 813 F.2d 1399, 1402 (9th Cir.1987), *aff'd*,

___ U.S. ___, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). In successive representation, "conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties." *Mannhalt*, 847 F.2d at 580. Among the dangers in a successive representation situation is that the attorney who has obtained privileged information from the former client may fail to conduct a rigorous cross-examination for fear of misusing that confidential information. *United States v. Agosto*, 675 F.2d 965, 971 (8th Cir.1982). The potential for conflicting interests is particularly acute when, as here, the two clients are, or were, codefendants who allege different levels of culpability in the crime. *Wheat*, 813 F.2d at 1403.

Adams' representation of Fitzpatrick meets the first prong of the *Cuyler* test: he actively represented conflicting interests when he represented Fitzpatrick after his representation of Bad Horse. Fitzpatrick's defense was that he did not commit the crimes; rather, Bad Horse, Bushman, and Holliday did. Thus, Fitzpatrick's defense theory was in direct conflict with that of Bad Horse.

The second prong of the *Cuyler* test requires a showing that the conflict affected counsel's performance. Adams' testimony at the post conviction hearing satisfies us that Adams' trial performance was indeed affected by the conflict.

Specifically, Adams failed to present evidence which, if offered, might have put enough uncertainty into the minds of the jury as to undermine a conviction beyond a reasonable doubt that Fitzpatrick committed the murder. Adams did not elicit testimony from Iva Lee Finch

regarding a conversation she overheard among Bad Horse, Bushman, and Holliday. The witness was one of the teenage girls who had traveled to Hardin with Bad Horse, Bushman, and Holliday. While she was riding with them back to Billings after the crimes, she overheard a conversation concerning Bad Horse hurting someone, which he "shouldn't have done." Evidence of this conversation was not presented to the jury.

In the state court evidentiary hearing on whether Fitzpatrick was denied effective assistance of counsel, Adams testified:

> Q. Would you have felt free at that time, given your previous relationship with Paul Bad Horse, to have explored a defense which would have implicated him as the guilty party in the Monte Dyckman homicide?
>
> A. That opportunity was afforded the state and I'm sure they did not try to conceal any evidence and I would not have explored it for the reason it would have been a lie.
>
> Q. Would you have felt free had you not believed it ~~to be a~~ lie, given your previous relationship with Mr. Bad Horse, to have explored it?
>
> A. Yes.
>
> Q. Did you explore it?
>
> A. No. For the reasons that I gave.
>
> . . . .
>
> Q. Now, Mr. Adams, in your experience as an attorney, do you find that your role as an advocate for a particular side sometimes tends to affect your perception of the facts and what you tend to convince yourself of the facts that you plead? Do you ever find that?

A. That calls for expounding.

Q. Expound.

A. Attorneys today have the belief that their job is to defend a client. They are to represent a client to the best of their ability, to insure that his rights at every stage of the proceeding are protected. But they should never lose sight of the fact that a court of law is a court where truth is sought and should be brought forward. Answers and questions should not infer incorrect inferences. The attorney is neither honest with himself nor honest with the public nor honest with his profession if he tries to do so. When I go into a case I go in as an advocate representing a client to give him the very best of my professional ability to see that he is properly represented in the courtroom, that undue advantage is not taken of him, either by the prosecution or by, perhaps, the laxity of the court. I've never found the courts lax but it could be. Therefore it is my job to see that that client, my client, is represented. My approach to a problem is, if the client is innocent, I'll go to hell for him, including going to jail, if necessary, to try and protect him. If my client has, for reasons that I won't divulge, left me with the belief that he may be guilty, I will still make the state prove its charge, because that is our constitutional right, that is the system on which this government has been based, and I do my very best under such circumstances to see that he is protected in every state of the proceeding, by objection, by answer, by argument and by otherwise, and to test to the fullest of my ability the truth and reliability of any statements that are put on the witness stand. A witness who is honest and does not exaggerate is a witness that need not be cross-examined. A witness that exaggerates, though they be honest, must be cross-examined and those exaggerations brought home to the jury. They may cause the jury to change its position.

In respect to this case, or any other case that I've represented a client, I've given him the best of my professional ability, and always will, but it will be within the ethics of the profession and one of those ethics is do not suborn perjury, do not try to deliberately mislead, knowing it's misleading of a jury, do not deliberately deceive, because you are in a court of law, which is a place where truth is sought and a place where truth should be brought forward.

Now, with that pontificating, I hope I have answered your question.

Q. You did not doubt it was true that Iva Lee Finch had made the statements that were recorded pre-trial, did you?

A. I did have no doubt that she will say – If you will note, the statement is somewhat leading and inferential.

. . . .

Q. And when you represented Paul Bad Horse, I take it that you came to the conclusion or the impression that Mr. Bad Horse was telling the truth with regard to his story that he was in Hardin elsewhere on the evening in question and was not involved in the homicide?

A. To answer that question inferredly would invade attorney-client relations, and rather than inferredly or otherwise, I will say that I will stand on attorney-client privileges regarding my knowledge or lack of knowledge of this case.

Adams' testimony proves that his belief in Bad Horse's innocence was produced in the attorney-client relationship based on communication which he protected by the attorney-client privilege and that it affected his performance in Fitzpatrick's trial. Prejudice is presumed. *Mannhalt*, 847 F.2d at 579. We hold that Fitzpatrick was

denied his sixth amendment right to effective assistance of counsel.[3] We reverse the district court.

II. Whether Fitzpatrick's Death Sentence for Deliberate Homicide Violates the Double Jeopardy Clause

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states by the Fourteenth Amendment, provides that in criminal proceedings no person shall be placed twice in jeopardy for the same offense. At Fitzpatrick's first trial in 1975, the judge sentenced him to life imprisonment for deliberate homicide. The death penalty statute then in effect directed the court to impose the death penalty on a person convicted of deliberate homicide if at least one of the five statutory aggravating circumstances was present, unless there were mitigating circumstances. Rev.Code Mont. § 94-5-105 (1947).

In 1977, the Montana Legislature repealed this statute and enacted the one under which Fitzpatrick was sentenced after retrial. Mont.Code Ann. §§ 46-18-301 to 46-18-310 (1985).[4] The aggravating circumstances portion

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[3] We reject the State's suggestion that Fitzpatrick waived any objection to Adams' potential conflict of interest by failing to object to Adams' representation at a hearing prior to his second trial. The proceedings at the hearing do not reflect a discussion of the potential conflict. *See Fitzpatrick v. State*, 206 Mont. 205, 212-13, 671 P.2d 1, 4-5 (1983). We do not think that Ftizpatrick's mere knowledge that Adams represented Bad Horse at the first trial is a basis for waiver of any conflict of interest objections at his second trial.

[4] The Montana Supreme Court upheld the constitutionality of the statute under which Fitzpatrick was originally

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of the statute potentially applicable to Fitzpatrick was not changed. However, the new statute directs the court to impose the death penalty if it finds one or more aggravating circumstances exist and "there are no mitigating circumstances sufficiently substantial to call for leniency." Mont.Code Ann. § 46-18-305. In this appeal, the State does not dispute Fitzpatrick's contention that at his second sentencing hearing, the State did not present any additional aggravating factors or any evidence disputing the existence of any mitigating factors presented at the first trial. Nevertheless, Fitzpatrick was sentenced to death for deliberate homicide following the second trial, apparently because the second trial judge found one of the statutory aggravating circumstances to exist: that the deliberate homicide was committed by a person lying in wait or ambush. Mont.Code Ann. § 46-18-303(4). *Fitzpatrick,* 186 Mont. at 218, 606 P.2d at 1360. The trial judge did not find any mitigating circumstances warranting leniency. *Id.*

(Continued from previous page)

sentenced to life imprisonment for the deliberate homicide. *State v. McKenzie,* 186 Mont. 481, 608 P.2d 428 (1980). This court found the statute constitutional in *McKenzie v. Risley,* 842 F.2d 1525 (9th Cir.1988).

We make no mention of Fitzpatrick's claim that his retrial under the new death penalty statute violates the ex post facto clause of the Constitution. The same argument was raised in *Coleman v. Risley,* 839 F.2d 434, 441-45 (9th Cir.1988). The *Coleman* opinion, however, was withdrawn for en banc consideration. *Coleman v. Risley,* 845 F.2d 884 (9th Cir.1988). Without suggesting that the resulting opinion will deal with this argument, we nevertheless find it advisable to refrain from deciding Fitzpatrick's petition on this ground.

The Double Jeopardy Clause forbids the retrial of a defendant who has been acquitted of the crime charged. The Supreme Court has been reluctant to extend this principle to sentencing. *Bullington v. Missouri*, 451 U.S. 430, 438, 101 S.Ct. 1852, 1857, 68 L.Ed.2d 270 (1981). However, the Court has recognized that a bifurcated sentencing trial in a death penalty case is comparable to a guilt trial for purposes of double jeopardy. The death penalty sentencing procedure

> differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. . . . The presentence hearing resemble[s] and, indeed, in all relevant respects [is] like the immediately preceding trial on the issue of guilt or innocence. . . .

Id. at 438; 101 S.Ct. at 1858.

In *Bullington*, the Court held that the Missouri capital sentencing statute violated the Double Jeopardy Clause because it permitted the defendant, who had been sentenced to life imprisonment at his first trial but had successfully appealed his conviction, to be sentenced to death upon retrial. The Court held that because at the defendant's first sentencing hearing the jury was required to determine whether the prosecution had "proved its case" as to the elements required to impose the death penalty and the jury imposed a life sentence, "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence." *Id.* at 444-45, 101 S.Ct. at 1861 (citations omitted).

The Supreme Court applied this reasoning to the Arizona death penalty procedure in a case similar to this. *Arizona v. Rumsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d

164 (1984). Rumsey was convicted after a trial of armed robbery and first degree murder. Following trial, the judge, without a jury, conducted a separate sentencing hearing to determine, according to the state's statutory scheme for considering aggravating and mitigating circumstances, whether death was the appropriate sentence. The judge found that no aggravating circumstances were present, and sentenced Rumsey to life imprisonment for murder and a consecutive sentence for the armed robbery.

Rumsey appealed, arguing that imposition of consecutive sentences violated state and federal law. This appeal permitted the State to cross-appeal on the ground that the trial judge wrongly interpreted the aggravating circumstance of murder for pecuniary gain. The Arizona Supreme Court rejected Rumsey's challenge, but agreed with the State regarding the proper interpretation of the pecuniary gain aggravating circumstance and remanded the case for resentencing.

In a new sentencing hearing on remand, the trial court found that given the state supreme court's definition of murder for pecuniary gain, the circumstance applied to Rumsey and it resentenced him to death.

The United States Supreme Court held that the Double Jeopardy Clause barred the imposition of the death penalty after that sentence had been rejected in the first proceeding:

> The double jeopardy principle relevant to respondent's case is the same as that invoked in *Bullington:* an acquittal on the merits by the sole decisionmaker in the proceeding is final and bars

> retrial on the same charge. Application of the *Bullington* principle renders respondent's death sentence a violation of the Double Jeopardy Clause because respondent's initial sentence of life imprisonment was undoubtedly an acquittal on the merits of the central issue in the proceeding – whether death was the appropriate punishment for respondent's offense.

Id. at 211, 104 S.Ct. at 2310.

The Supreme Court also held that the trial judge's reliance on an error of law at the first sentencing proceeding did "not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits." *Id.*

Since *Rumsey,* other circuit courts have found that "after a death penalty sentencing proceeding, where there is an implicit acquittal from the death penalty based on facts presented, the defendant . . . is protected by the double jeopardy clause from subjection to a second hearing where the death penalty may be imposed." *Bullard v. Estelle,* 665 F.2d 1347, 1357 (5th Cir.1982), *vacated on other grounds,* 459 U.S. 1139, 103 S.Ct. 776, 74 L.Ed.2d 987 (1983); *see also, Young v. Kemp,* 760 F.2d 1097, 1107 n. 12 (11th Cir.1985), *cert. denied,* 476 U.S. 1123, 106 S.Ct. 1991, 90 L.Ed.2d 672 (1986).

In this case, Fitzpatrick had a separate sentencing proceeding following his first trial, at which the State had the burden of showing the existence of aggravating circumstances. This permitted the presentation of additional evidence not introduced at trial. The first judge's imposition of life imprisonment was essentially a judgment in Fitzpatrick's favor as to the existence of any aggravating or mitigating circumstances, and amounts to an "acquittal on the merits" for purposes of the death penalty. The first

trial judge, under a statute found constitutional by the Montana Supreme Court and this court, determined that death was inappropriate for Fitzpatrick. "Having received 'one fair opportunity to offer whatever proof it could assemble,' the State is not entitled to another," *Bullington*, 451 U.S. at 446, 101 S.Ct. at 1862 (citations omitted).

CONCLUSION

We reverse the district court's denial of the writ of habeas corpus on the ground that Fitzpatrick was denied effective assistance of counsel. We also hold that the sentence of death for deliberate homicide violated Fitzpatrick's Fifth Amendment rights in that it subjected him to double jeopardy. We remand this case to the district court with the direction that it issue the writ on all three charges and determine a reasonable time in which to retry Fitzpatrick.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BERNARD FITZPATRICK, Petitioner, -vs- HENRY RISLEY, as Warden of the Montana State Prison, Respondent.	)	CV 83-314-BLG-JFB MEMORANDUM OPINION

(Filed April 2, 1987)

Presently pending before the Court is petitioner's petition for a writ of habeas corpus seeking relief pursuant to 28 U.S.C. § 2254. The parties have submitted cross-motions for summary judgment. The Court finds no factual issues which require an evidentiary hearing. For reasons stated below, respondent's motion for summary judgment is granted and petitioner's motion for summary judgment is denied.

FACTS AND PROCEDURE

In February 1978, the petitioner was convicted by a jury of deliberate homicide, aggravated kidnapping and robbery in the death of Monte Dyckman, an assistant manager of the Safeway Store in Hardin, Montana. The facts and circumstances of the crime are set forth in *State v. Fitzpatrick*, 186 Mont. 187, 190-97, 606 P.2d 1343,

1345-47, *cert. denied*, 449 U.S. 891 (1980). On April 5, 1978, Hon. Charles Luedke, District Judge of the Thirteenth Judicial District of the State of Montana, sentenced petitioner to death for the crimes of deliberate homicide and aggravated kidnapping and to 100 years' imprisonment for robbery.

The Montana Supreme Court affirmed petitioner's conviction and sentence in *State v. Fitzpatrick, supra*. A motion for rehearing was denied. The United States Supreme Court denied petitioner's writ of certiorari. 449 U.S. 891 (1980). In October 1980, the petitioner filed a petition for post conviction relief. The petition was dismissed by Judge Luedke. In September 1981, the Montana Supreme Court reversed the dismissal in part. *Fitzpatrick v. State*, ___ Mont. ___, 638 P.2d 1002 (1981). An evidentiary hearing was then held before Judge Luedke. Petitioner's remaining claims were dismissed. On October 8, 1983, the Montana Supreme Court affirmed the order of dismissal. On December 8, 1983, petitioner filed his petition for a writ of habeas corpus in this Court. Petitioner's state remedies are fully exhausted, and the petition is ripe for review by the Court.

DISCUSSION

I. *Constitutionality of State Custody*

A. *Denial of Confrontation*

In support of his argument that he is being held in custody unlawfully and unconstitutionally, petitioner first asserts that he was denied his 6th Amendment right to confront witnesses against him by the admission of

testimony concerning unsworn statements allegedly made by an accomplice, accusing petitioner of committing the crimes with which he was charged. At petitioner's trial, Edwin Bushman, an alleged accomplice, testified for the State that Gary Radi, another alleged accomplice, told Bushman and others that " 'Fritz [petitioner] didn't have to shoot the kid. Boom, boom, he shot his head off.' " Tr. p. 259.

The United States Supreme Court recently addressed whether a co-conspirator's out-of-court statements may be placed in evidence against a defendant. In *United States v. Inadi*, ___ U.S. ___, 106 S.Ct. 1121 (1986), the Court held that the Confrontation Clause does not require a showing of unavailability as a condition of admission of out-of-court statements. The Court distinguished *Ohio v. Roberts*, 448 U.S. 56 (1980), relied on by petitioner, and concluded that *Roberts* was authoritative only for situations in which testimony given at a prior judicial proceeding is offered as a substitute for live testimony at trial. *Inadi*, 106 S.Ct. at 1125-26. The principles underlying the unavailability rule do not apply to statements made by co-conspirators, and the "admission of co-conspirators' declarations into evidence thus actually furthers the 'Confrontation Clause's very mission' which is to 'advance "the accuracy of the truth-determining process in criminal trials." ' [Citations omitted]." *Id.* at 1127. The Court affirmed the validity of the use of a co-conspirator's statements and declined to impose a constitutional rule requiring unavailability before a co-conspirator's declarations are introduced.

The Montana Supreme Court found that, under the Montana Rules of Evidence, Bushman's testimony

concerning Radi's out-of-court statements was properly admitted. *State v. Fitzpatrick*, 186 Mont. at 195-204, 606 P.2d at 1348-1353. Admission of that testimony did not violate petitioner's constitutional right of confrontation.

B. *Denial of Fair Jury.*

Petitioner claims that pretrial publicity denied him a fair and impartial jury because jurors permitted to sit on the jury had formed opinions of petitioner's guilt or innocence and had been exposed to information regarding petitioner's prior conviction in the first trial.

A fair trial by an impartial jury is a basic requirement of due process. Indeed it is the most priceless safeguard for the preservation of individual liberty. *Irvin v. Dowd*, 366 U.S. 717, 721 (1961). While juror impartiality and indifference are essential, jurors need not be

> totally ignorant of the facts and issues involved. . . . To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. [Citations omitted].

Id. at 722-23. The burden is on petitioner to show the actual existence of an opinion in a juror's mind which raises the presumption of partiality or the juror need not be set aside. *Id.* at 723.

Upon evaluation of the *voir dire* testimony of the impaneled jurors, the Court concludes that the state court

findings of impartiality should not be set aside because there is no manifest prejudice. *Id.* at 723-24. Each juror indicated that he or she could be fair and impartial. The record does not reveal a buildup of prejudicial pretrial publicity, although the jurors may have known of petitioner's prior conviction in his previous trial. The publicity surrounding the trial did not infect the proceedings so as to create manifest prejudice.

C. *Denial of Unanimous Verdict*

Petitioner claims that the jury instructions permitted his conviction without unanimous agreement that he committed any one of the acts which constituted the crimes with which he was charged, in violation of the right to a unanimous verdict guaranteed by the 6th and 14th Amendments to the Constitution. Without examining the issue of whether the jury instructions given in petitioner's trial permitted a conviction without unanimous agreement, the Court must first determine whether a unanimous verdict is guaranteed by the 6th and 14th Amendments. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court concluded that the requirement of unanimity is not of constitutional stature. In a federal habeas corpus proceeding, relief may be granted only on the basis of federal constitutional violations. 28 U.S.C. § 2254(a). Although the Montana Constitution may require unanimity, relief cannot be granted by this Court for a claimed violation of a state constitution. *See Wills v. Egeler*, 532 F.2d 1058 (6th Cir. 1976). Nevertheless, the Montana Supreme Court found that the requirement of unanimity guaranteed by the Montana Constitution was

satisfied in petitioner's case. *Fitzpatrick v. State*, ___ Mont. ___, 638 P.2d at 1011-12. Petitioner's argument that he was denied his constitutional right to a unanimous jury verdict must fail. *See also, Coleman v. Risley*, CV 81-272-BLG, Memorandum Opinion at 15-16 (D. Mont., August 8, 1985).

D. *Unconstitutional Presumptions*

Petitioner contends that the jury instructions improperly shifted the burden of proof to him by permitting the jury to presume elements of the charged offenses, in violation of the 6th and 14th Amendments. Due process requires that the prosecution prove "every fact necessary to constitute the crime with which [the defendant] is charged" beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). An instruction creating a presumption that has the effect of shifting the burden of proof on intent to the defendant violates due process. *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979). To determine whether an instruction impermissibly shifted the burden of proof, a Court must examine the nature of the presumption and whether the instruction created a mandatory presumption or merely a permissive inference. *Francis v. Franklin*, 471 U.S. 307, ___, 105 S.Ct. 1965, 1971 (1985). However, when the guilty verdicts reached in a case in which improper instructions shifted the burden of proof are correct beyond a reasonable doubt, reversal is not required. The reviewing court must consider the entire record and determine whether the error is harmless beyond a reasonable doubt. *Rose v. Clark*, ___ U.S. ___, 106 S.Ct. 3101 (1986).

Petitioner cites three instructions that impermissibly shifted the burden of proof to him:

(1) Instruction No. 11 read, in part, "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence.";

(2) Instruction No. 13 read, in part, "It is reasonable to infer that a person ordinarily intends the natural and probably [sic] consequences of acts knowingly done, knowingly omitted, purposely done, or purposely omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done, knowingly omitted, purposely done or purposely omitted.";

(3) Instruction No. 27 read, in part, " . . . when two or more persons agree to commit a crime under such circumstances as may, when tested by human experience, specifically result in the taking of a human life, either in the furtherance of, or in the resistance to their unlawful agreement, then each party to such common understanding will be held responsible for the consequences which might be reasonably expected to flow, and which do flow from carrying into effect their unlawful agreement, including the taking of human life, even though the taking of human life was not specifically intended as a part of the original plan."

The first challenged instruction, defining knowledge, did not shift the burden of proof to defendant to show

that he did not act knowingly. The prosecution had the burden of proving beyond a reasonable doubt that defendant acted knowingly. The instruction did not permit the jury to presume knowledge from defendant's conduct or circumstances. Defendant's knowledge of a fact had to be established by his awareness of a high probability of its existence. The instruction did not call for presumptions or inferences.

The second instruction, that "knowingly" or "purposely" may be proved by circumstantial evidence, allowed the jury to infer that defendant intended the consequences of acts knowingly or purposely done or omitted. The inference, however, is permissive. The instruction does not create a mandatory presumption such as was condemned in *Sandstrom* and *Francis*.

The third instruction, taken in its entirety, defines felony murder and the resultant killing as deliberate homicide. The prosecution had the burden of proving deliberate homicide beyond a reasonable doubt. *See Instructions* Nos. 23-24, Tr. pp. 1212-13. Moreover, if the instruction did create a mandatory presumption, and this Court does not believe it did, on the basis of the record as a whole the error was harmless beyond a reasonable doubt.

Petitioner did not contest intent or knowledge at trial. His defense was one of alibi. The jury rejected the defense and convicted petitioner of deliberate homicide, aggravated kidnapping and robbery. The jury was clearly instructed that it must find defendant guilty beyond a reasonable doubt of each offense charged and the proof required to sustain the charges. *See Instructions* Nos.

21-26, Tr. pp. 1211-15. The evidence before the jury was dispositive of intent. The jury would have found it unnecessary to rely on presumptions of intent. In convicting petitioner, the jury must have accepted accomplice Edwin Bushman's testimony that accomplice Gary Radi said, "Fritz didn't have to shoot the kid. Boom, boom, he shot his head off." Tr. p. 259.

E. *Prosecutorial Misconduct in Argument.*

In closing arguments, the prosecutor told the jury that Edwin Bushman could not have been prosecuted if Bushman had testified that he shot the victim because he had been granted immunity. Petitioner argues that the prosecutor's false representation in closing arguments violated his right to due process and to a fair trial.

The parties have stipulated that Edwin Bushman's immunity from prosecution was contingent on his testifying at trial in October 1975. Following his testimony, by Court order of October 15, 1975, Bushman was granted "full immunity from any and all prosecutions pending and which possibly might arise. . . ." *Appendix to Answer,* Vol. IIIA, Doc. S, a-4. The parties also stipulate that Mr. Bushman was never granted immunity from prosecution for perjury in his testimony. Petitioner contends that Bushman could have been prosecuted for perjury if he had admitted he shot the victim in the February 1978 trial after denying it in the October 1975 trial.

No claims has been made that the prosecutor's remark prejudiced a specific right guaranteed by the Bill of Rights, such as the right to counsel or the privilege

against self-incrimination, so as to amount to a denial of that right. Thus, the inquiry is whether the remark "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974).

The jury was instructed that statements of counsel were not evidence. The jury also had before it independent testimony and corroborating evidence supporting Mr. Bushman's testimony. Tr. pp. 1307-12. There was overwhelming evidence to support a finding of guilty on all charges, which reduced the likelihood that the jury was persuaded by or relied upon closing arguments of counsel. *Darden v. Wainwright*, ___ U.S. ___, 106 S.Ct. 2464 (1986). Closing arguments

> are seldom carefully constructed *in toto* before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury . . . will draw that meaning from the plethora of less damaging interpretations.

Id. at 646-47.

The Court concludes that the prosecutor's remark, which ignored the fact that Edwin Bushman was not immune from prosecution for perjury, did not infect the trial with unfairness so as to deprive petitioner of due process or a fair trial.

F. *Ineffective Assistance of Counsel at Trial.*

Petitioner claims that he was denied his right to effective assistance of counsel at trial because his court-

appointed counsel had previously represented a codefendant in whom counsel believed, thereby creating doubt in counsel's mind that petitioner was innocent. Petitioner contends that his counsel did not fully investigate or set forth petitioner's defense of alibi. Petitioner asserts that certain witnesses were not called who could have substantiated his defense.

The United States Supreme Court recently considered the proper standard for judging a contention that a conviction or death sentence be set aside because counsel was ineffective. *Strickland v. Washington*, 466 U.S. 668 (1984). The purpose of the constitutional requirement of effective assistance is to assure a fair trial. Thus, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

A two-part inquiry is necessary to analyze whether reversal for ineffective assistance is required: (1) whether counsel's performance was deficient in that he or she made errors so serious that he or she was not functioning as "counsel"; *and* (2) whether counsel's deficient performance prejudiced the defense by depriving defendant of a fair and reliable trial. *Id.* at 687. A showing of both deficiency and prejudice is required to sustain a claim of ineffective assistance of counsel. *Id.* In measuring whether counsel's performance was deficient, the yardstick is simply reasonableness under prevailing professional norms and considering all the circumstances. Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 688-89. To satisfy the prejudice prong,

petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The above standards guide the Court's determination of whether petitioner's counsel failed to adequately investigate and prepare defendant's alibi defense. Counsel's conduct in this case was reasonable considering all the circumstances. Petitioner's so-called alibi witnesses were vague and could not say that they saw petitioner in Billings when the robbery, kidnapping and murder in Hardin was being committed. No one identified by petitioner as an alibi witness could place him in Billings after the early evening hours of the night of the crime. In fact, petitioner's counsel in his first trial, Chris Nelson, did not think that there was a good alibi defense. Transcript of April 12, 1982, p. 57. He considered Edna Torske the only strong witness and, by the February 1978 trial, she had become a reluctant and vague witness.

Even if petitioner's counsel committed error in not fully investigating petitioner's alibi defense, the Court cannot say that the result of the trial would have been different. Petitioner's vague and uncertain witnesses would have been judged in light of the testimony of Edwin Bushman and Christine Fetters (petitioner's girlfriend at the time of the murder), which not only placed petitioner at the scene but had him pulling the trigger and then covering his tracks in the ensuing weeks. Under the circumstances, vague alibi witnesses would not have undermined confidence in the outcome of the trial.

The final argument made by petitioner is that his counsel had a conflict of interest because petitioner's counsel had represented Paul Bad Horse, a codefendant, in an earlier trial. In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the United States Supreme Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest but petitioner must demonstrate that his counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 350, 348 [sic] (footnote omitted).

Petitioner did not object before trial to his counsel's representation as imperiling his right to a fair trial. Thus, he must now demonstrate that an actual conflict rendered his counsel ineffective. Petitioner's speculation that his counsel did not vigorously pursue his defense because his counsel believed that Bad Horse was innocent fails to show that an actual conflict existed. Petitioner's counsel did not actively represent conflicting interests. The Court will not presume that petitioner was prejudiced by his counsel's representation.

II. *Constitutionality of Petitioner's Death Sentences*

A. *Increased Sentence on Retrial.*

Following petitioner's first trial and conviction, he was sentenced to imprisonment of 100 years for deliberate homicide. Petitioner's conviction was reversed on appeal and, after a new trial, he was sentenced to death for the deliberate homicide conviction. Petitioner asserts that the increased sentence violated his constitutional right not to be placed in double jeopardy because the life

sentence was an "acquittal" on the issue of whether defendant should be sentenced to death. *Bullington v. Missouri*, 451 U.S. 430 (1981); *Arizona v. Rumsey*, 467 U.S. 203 (1984).

In *Bullington* and *Rumsey*, the United States Supreme Court held that the double jeopardy clause of the 5th Amendment prohibited the States of Missouri and Arizona, respectively, from imposing the death penalty on reconviction after an initial conviction and life sentence were set aside on appeal. The capital sentencing proceedings in Missouri and Arizona are comparable to a trial for double jeopardy purposes, the Court found, and defendant may not be resentenced to death after he has been "acquitted" of that penalty. *Rumsey*, 467 U.S. at 209. Characteristics of Missouri's and Arizona's sentencing proceeding that resemble a trial include that the sentencer is restricted to two options, life imprisonment and death; the sentencing decision is guided by specific statutory standards defining aggravating and mitigating circumstances, and death may not be imposed unless at least one aggravating circumstance is found beyond a reasonable doubt but it is mandated if there is one aggravating circumstance and no mitigating circumstances; and the sentencer must make findings based on evidence introduced and argument presented at a sentencing hearing that formally resembles a trial (*e.g.*, the usual rules of evidence govern and the state must prove existence of aggravating circumstances beyond a reasonable doubt).

The question before the Court, then, is whether Montana's capital sentencing proceeding is like a trial for purposes of double jeopardy or whether it is distinguishable from the proceedings in Missouri and Arizona. After

reviewing Montana's capital sentencing proceeding, the Court concludes that it is not comparable to a trial for double jeopardy purposes. First, the sentencing hearing is not a continuing trial of the defendant's guilt or innocence. Sentencing is separate from the trial on guilt or innocence. It resembles a hearing rather than a trial. Second, although the sentencing judge must follow specific guidelines, he or she has wider discretion in imposing a sentence other than death. The sentencer is not restricted to life imprisonment or death. Thus, there is not really an "acquittal" on the other possible punishments. Finally, the state does not have the burden of proving its case beyond a reasonable doubt as to one punishment.

Montana's capital sentencing proceeding does not resemble a trial and judgment so as to prohibit, on the basis of double jeopardy, the imposition of the death penalty on petitioner's reconviction after the initial conviction and life sentence were set aside on appeal. Petitioner's argument that his death sentence for deliberate homicide is an unconstitutional violation of the double jeopardy clause of the 5th Amendment must fail.

B. *Ex Post Facto Death Penalty Law*

Petitioner argues that the amended sentencing statutes for aggravated kidnapping, which became effective after the crimes that petitioner was convicted of were committed, are *ex post facto* laws and, therefore, violate the Constitution. Art. I, Sec. 10. A statute is prohibited as *ex post facto* if it punishes as a crime an act previously committed which was innocent when done, if it makes the punishment for a crime more burdensome after its

commission, or if it deprives the accused of any defense available at the time when the act was committed. *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). The constitutional provision against *ex post facto* laws, however, is not intended to limit remedies and modes of procedure which do not affect matters of substance. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

At the time of the crimes, the sentencing statute for aggravated kidnapping stated:

> A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as the result of the criminal conduct.

§ 94-5-304, R.C.M. 1947. In *State v. Coleman*, 177 Mont. 1, 579 P.2d 732 (1978), the Montana Supreme Court found § 94-5-304 unconstitutional. Petitioner was sentenced to death for aggravated kidnapping under amended statutes which required the sentencing judge to consider aggravating and mitigating circumstances. The amendments were ameliorative and not substantial. They did not change the quantum of punishment but simply altered the method required to determine whether the death penalty was available. Thus, the amendments did not deprive petitioner of a substantial right which existed when the crime of aggravated kidnapping was committed. The amended statutes under which petitioner was sentenced to death were not *ex post facto* laws. *Coleman v. Risley*, CV 81-272-BLG, Memorandum Opinion at 24-25 (D. Mont., August 8, 1985).

C. *Unconstitutional Burden of Proof.*

Petitioner claims that the statutory procedures under which his death sentences were imposed unconstitutionally placed the burden of persuasion on petitioner to establish mitigating circumstances sufficiently substantial to call for leniency. Petitioner also challenges the statutory scheme which requires imposition of the death penalty if there are aggravating, and no mitigating, circumstances without allowing the sentencer to decide if the death penalty is appropriate in each case.

Under Montana's sentencing statutes, the prosecution has the burden of proving at trial at least one statutory aggravating circumstance beyond a reasonable doubt. During sentencing, petitioner must then come forward with evidence of mitigation. This Court has found that placing the burden of producing evidence in mitigation on the defendant is constitutional. *McKenzie v. Risley,* CV 81-170-GF, Memorandum Opinion at 30-31 (D. Mont., July 20, 1984). Additionally, the Ninth Circuit has found Montana's death penalty statutes constitutional. *McKenzie v. Risley,* 801 F.2d 1519, 1530 (9th Cir. 1986). In order to be constitutional, the procedural scheme must limit the discretion of the sentencer but must permit the sentencer to consider relevant mitigating factors. Thus, there is statutory guidance which lessens the chance of arbitrary application of the death penalty. Petitioner's argument that the scheme does not allow the sentencer to decide if death is appropriate in each case is meritless.

D. *Denial of Right to Jury Determination on Sentencing Issues.*

Petitioner's argument that he was denied the constitutional right to a jury trial on aggravating circumstances

is without merit. Aggravating circumstances can be found by a judge without a jury. *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). Jury participation in the capital sentencing proceeding is not required, and placing the responsibility on the trial judge to impose the sentence is not unconstitutional. *Id.*

E. *Lack of Proportionality Review*

Comparative proportionality review is not constitutionally required in every state court death sentence review. *Pulley v. Harris*, 465 U.S. 37 (1984). Nevertheless, Montana statutes require the Montana Supreme Court to automatically review all death sentences. Mont. Code Ann. § 46-18-307 (formerly § 95-2206.12, R.C.M. 1947). The Montana Supreme Court reviewed petitioner's death sentences. It also determined whether petitioner's sentences were "excessive or disproportionate to the penalty imposed in similar cases." *State v. Fitzpatrick*, 186 Mont. at 220-223, 606 P.2d at 1361-63 (death sentences for aggravated kidnapping and deliberate homicide were not excessive or disproportionate). Thus, there was appellate review to insure that the death sentences were legal and proportional.

F. *Excessiveness of the Death Penalty for Kidnapping and Felony Murder*

Petitioner contends that his death sentences are unconstitutional because the death penalty is constitutionally disproportionate to the offense of kidnapping and his homicide conviction was not based on a jury

finding that petitioner deliberately or personally took the victim's life. Petitioner was convicted of aggravated kidnapping. Under Montana law, the death penalty may be imposed for kidnapping if the victim dies as the result and there are no mitigating circumstances. When a life has been deliberately taken, the death penalty is not disproportionate. *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

Petitioner contends that there was no jury finding that petitioner deliberately took the victim's life. While a finding of intent may be required before the death penalty is imposed, *Enmund v. Florida*, 458 U.S. 782 (1982)[1], a jury finding is not required by the Eighth Amendment. *Cabana v. Bullock*, ___ U.S. ___, 106 S.Ct. 689, 714 n. 1 (1986). A trial judge or an appellate court may constitutionally make the requisite findings of intent and culpability. "Assuming, without deciding, that [petitioner] is correct that the jury made no specific finding on intent, the question then becomes whether the trial judge or the Montana Supreme Court made the requisite finding of intent in this case." *McKenzie v. Risley*, 801 F.2d at 1528 (9th Cir. 1986).

On appeal, the Montana Supreme Court stated: "when all of the facts and circumstances of the State's

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[1] The Court notes that the United States Supreme Court recently held that "the reckless disregard for human life implicit in knowingly engaging in criminal activity known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result." *Tison v. Arizona*, No. 84-6075, U.S.S.Ct. (April 21, 1987).

case against [Fitzpatrick] are considered, including the evidence we have held was properly admitted, an unmistakable conclusion is reached. Defendant purposely kidnapped, robbed and caused the death of Monte Dyckman." *State v. Fitzpatrick*, 186 Mont. at 210, 606 P.2d at 1356. Petitioner's death sentences were based on findings that petitioner deliberately took the life of the victim.

G. *Consideration of Unconstitutional Prior Conviction.*

Petitioner next argues that his death sentences are unconstitutional because they are based on evidence of a prior murder conviction obtained in violation of petitioner's right to counsel. The sentencing court found that petitioner had "a significant history of prior criminal activity." That finding, petitioner argues, was based, in part, on a homicide conviction obtained in violation of petitioner's right to effective legal representation.

The aggravating circumstances found by the Court were that the deliberate homicide had been committed by a person lying in wait or ambush and that the aggravated kidnapping resulted in the death of the victim. Both circumstances mandate the imposition of the death penalty unless there are mitigating circumstances. It is a mitigating circumstance if the defendant has no significant history of prior criminal activity. Mont. Code Ann. § 46-18-304 (formerly § 95-2206.9, R.C.M. 1947). A prisoner's behavior in jail or prison, to indicate his character as well as his probable future behavior, is also a source of mitigation. *Skipper v. South Carolina*, ___ U.S. ___, 106 S.Ct. 1669 (1986). The sentencer found that petitioner had been

convicted in the death of a fellow inmate but that the conviction was set aside on grounds that petitioner was denied effective legal representation and a speedy trial. The sentencer noted that the incident could not be used in aggravation but that it was material to defendant's conduct in prison, which was not a source of mitigation. The judge recognized that the conviction could not be used. There was no "mistaken belief" that the prior conviction was constitutionally valid. *United States v. Fleishman*, 684 F.2d 1329, 1346 (9th Cir. 1981), *cert. denied*, 459 U.S. 1044 (1982).

H. *Denial of Confrontation at Sentencing*

Petitioner argues that he was denied due process at sentencing because the Court considered hearsay information contained in a 1975 presentence report and because he did not have an opportunity to confront or rebut information which was placed before the sentencer. Petitioner does not identify the hearsay or informal information which may have been before the sentencing court. Petitioner did, however, have full access to the presentence report as well as an opportunity to rebut or explain its contents at the sentencing hearing. It was properly before the Judge. *Gardner v. Florida*, 430 U.S. 349 (1977), is inapposite. Petitioner cites no confidential information of the type condemned in *Gardner* that was before the sentencer. He was not denied due process at the sentencing hearing.

I. *Arbitrary and Discriminatory Death Sentencing*

Petitioner argues that his death sentences are unconstitutional because the death penalty has been administered and applied arbitrarily, capriciously and whimsically in Montana and the United States. However, the arbitrariness and capriciousness condemned in *Furman v. Georgia*, 408 U.S. 238 (1972), are conclusively removed from the death penalty proceeding if the state adheres to a properly drawn death penalty statute. *See Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied sub nom* 440 U.S. 976 (1979). A death penalty statute is constitutional if there is guidance of the fact finders' discretion and an opportunity for review of the exercise of that discretion. Thus, a statute will be upheld if it provides for the consideration of aggravating and mitigating factors, written findings stating reasons for imposition of the penalty, and a procedure for the review of the legality and appropriateness of the sentence. *McKenzie v. Risley*, 801 F.2d at 1528 (Montana's death penalty statutes constitutional).

The statutes under which petitioner was sentenced to death provide statutory requirements of finding aggravating and mitigating circumstances and entitle a defendant in a capital case to a hearing in which he may present testimony and evidence in mitigation. There is also appellate review to insure that the sentence is legal and proportional. For a discussion of the statute, *see State v. Fitzpatrick*, 186 Mont. at 215-220, 606 P.2d at 1358-61 (sentencing statutes at time of crime constitutional and amended statutory provisions in effect at time of trial and under which defendant was sentenced not *ex post facto*

laws). Thus, Montana's death penalty scheme conclusively eliminates the possibility of arbitrary and capricious sentencing.

Petitioner also argues that the death penalty discriminates against impoverished male defendants accused of killing Caucasians and is applied upon the sole grounds of race, poverty and sex. However, even a showing that the death penalty impacts one racial or social group more than another will not, without more, result in a *per se finding of discrimination. City of Memphis v. Greene*, 451 U.S. 100, 119 (1981); *Spinkellink*, 578 F.2d at 615.

The sentencing judge made findings and gave reasons for the imposition of the death penalty, which was based in part on defendant's significant criminal history and the absence of any other mitigating factors. The state court findings are fairly supported by the record. Petitioner's bare allegation of discrimination, without more, must fail.

J. *Excessive Cruelty of Death*

In 1972, the people of the State of Montana voted to retain the death penalty. The Montana Legislature provided the death penalty for crimes of which petitioner has been convicted. This Court cannot say that the penalty of death is excessively cruel. That is for the people of Montana or the elected legislature to decide:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not

> cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.
>
> This is true in part because the constitutional test is intertwined with an assessment of the contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' [Citations omitted, bracket in original].

Gregg v. Georgia, 428 U.S. 153, 175 (1976). The Court has previously concluded that petitioner's death sentences are not excessive or disproportionate. *See* II.E., F.; *State v. Fitzpatrick*, 186 Mont. at 220-223, 606 P.2d at 1361-63. The legislature is free, therefore, to select death as the punishment for petitioner without violating the Constitution.

K. *Cruelty of Hanging*

The Court has previously ruled that hanging does not constitute cruel and unusual punishment under the Eighth Amendment. *Coleman v. Risley*, CV 81-272-BLG, Memorandum Opinion at 21-22 (D. Mont., Aug. 8, 1985); *McKenzie v. Risley*, CV 85-199-GF, Memorandum Opinion at 1-2 (D. Mont., March 3, 1987). Furthermore, petitioner had the option of electing lethal injection, which is constitutionally permissible. *Coleman, supra. Felder v. Estelle*, 588 F.Supp. 664, 674 (S.D. Texas 1984). Petitioner's claim that Montana's 1983 Senate Bill 394, providing an optional provision for death by lethal injection at the election of the defendant, is a bill of attainder was rejected by this

Court in *McKenzie v. Risley,* CV 85-199-GF (D. Mont., March 3, 1987).

L. *Ineffective Assistance of Counsel at Sentencing.*

As stated in I.F., *Strickland's* two-part test for ineffective assistance of counsel requires a showing of both serious attorney error and prejudice. Petitioner claims that his counsel was ineffective at the sentencing hearing because counsel presented argument instead of mitigating evidence and asserted that petitioner had acted in self-defense when he killed an inmate during a prison fight. However, the sentencer did not use evidence of the prison homicide in aggravation, *see* II.G., and petitioner has not shown what, if any, sufficiently substantial mitigating circumstances could have been brought into evidence. Counsel indicated that petitioner was from a broken home, that he was small in stature and had a lisp, and that he had grown up in a rough neighborhood. However, any other potentially mitigating evidence that was available could have opened the door to damaging evidence in rebuttal. Thus, petitioner's attorney's decision not to introduce any mitigating evidence at sentencing was not serious error. *Darden v. Wainwright,* ___ U.S. ___, 106 S.Ct. 2464 (1986).

CONCLUSION

The Court has thoroughly reviewed petitioner's petition for a writ of habeas corpus, the transcripts before the Court, the briefs and attachments of the parties, and the applicable law. There are no factual issues which require

an evidentiary hearing. The petition for a writ of habeas corpus must be denied as a matter of law because no grounds raised by petitioner support a finding that he is in custody in violation of the Constitution or laws or treaties of the United States.

The Court will issue an order in conformity to this Memorandum Opinion.

Done and dated this 28th day of April, 1987.

/s/ James F. Battin
Chief Judge

APPENDIX C

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF BIG HORN

THE STATE OF MONTANA, Plaintiff, vs. BERNARD JAMES FITZPATRICK, Defendant.	Cause No. 1107-C FINDINGS, CONCOLUSIONS [sic], JUDGMENT and ORDER

Pursuant to an Amended Information filed on the 28th day of November, 1977, Bernard James Fitzpatrick, defendant herein, was charged with the crimes of deliberate homicide, aggravated kidnapping and robbery. To each charge he pleaded "not guilty" and a jury trial was thereupon accorded, in the course of which defendant was represented by competent counsel and at the end of which the jury returned verdicts of guilty on all three charges on the 2nd day of March, 1978.

On the 13th day of March, 1978, a separate sentencing hearing was held to determine the existence or nonexistence of aggravating circumstances or mitigating circumstances in line with the provisions of Sections 95-2206.6, 95-2206.7, 95-2206.8 and 95-2206.9, and to determine whether the defendant is a persistent felony offender under the provisions of Section 95-1506 and 95-1507. At such hearing, as at the jury trial, defendant was represented by his counsel, John L. Adams, Jr., and

also appeared in person. Both parties having been given the opportunity to place before the Court all matters each deemed relevant and competent bearing upon a determination of appropriate sentences to be imposed upon the three guilty jury verdicts rendered, and the Court having reviewed all matters submitted, together with the evidence produced at trial, the defendant's character, background and history, including his relevant previous criminal history as hereinafter specifically enumerated, and after observing the defendant's demeanor during the trial and while testifying on his own behalf, the Court now makes the following findings, conclusions, judgment and order.

FINDINGS

1. That on the 5th day of April, 1975, being only eight days after his release from the Montana State Prison, the defendant was lying in wait or ambush at the Big Horn Drive-in Bank in Hardin, Montana, for the arrival of an employee of the Hardin Safeway Store carrying the store receipts for deposit in the bank. The courier on that night was a young man, Monte Dyckman, who occupied the position of assistant manager at Safeways. Upon his arrival at the drive-in bank, Dyckman was robbed by the defendant and then abducted in his own automobile, his hands being bound behind his back, and was taken by the defendant to the Toluca Interchange approximately 12 mile-west of Hardin where, in a secluded spot behind a pile of gravel, the defendant shot him twice in the head with a .45-caliber semi-automatic pistol, causing instantaneous death. That such death was the proximate result of robbery plans initiated several

days earlier. That the defendant had travelled to Butte, Montana, and secured a handgun which he brought back to Billings immediately prior to the robbery, abduction and killing and which he thereafter disposed of by burying in the ground at some site not now capable of being located.

2. That the defendant has a significant history of prior criminal activity. Some of it occurred prior to his taking up residency in Montana in 1963 and the information with respect to that phase appears in the pre-sentence report filed with the Court in 1975. Since moving to Montana, his contacts with the criminal law can be enumerated as follows:

a. On June 1, 1965, the defendant was charged with assault in the second degree, involving alleged grievous bodily injury upon one Larry Ruff. This case was dismissed eight months later at the request of the county attorney for the reason that the prosecuting witness could not be located and the case could not be prosecuted further without his testimony. (State's Exhibit 68)

b. On August 3rd, 1965, defendant was charged in City Police Court with reckless driving and leaving the scene of an accident. After a jury verdict of guilty, he appealed to the District Court, which was later disposed of by a change of plea to guilty and the payment of a fine. (State's Exhibit 67)

c. The defendant was found guilty of assault in the second degree on September 13, 1966, in Billings, Montana, wherein he shot LeRoy Gash seven times in the

upper part of the left leg with an automatic pistol, receiving a sentence of six years in the Montana State Prison. (State's Exhibit 66)

d. On July 28th, 1971, charges were filed in the Yellowstone County District Court charging the defendant, and others, with the crimes of burglary and criminal possession of dangerous drugs. This cause was dismissed at the request of the county attorney on the ground that "he (Fitzpatrick) has entered a plea of guilty to another charge," being the charge described in the paragraph following. (State's Exhibit 64)

e. On October 29th, 1971, defendant entered a plea of guilty to a charge of assault in the first degree and received a sentence of five years in Montana State Prison. On this occasion the defendant invited one James Prince to step out the back door of the Western Bar in Billings, Montana, and once outside defendant shot Prince in the face with an automatic pistol. (States' Exhibit 65)

f. On February 28th, 1973, while confined in the Montana State Prison, defendant was implicated in the death of a fellow inmate, Alfred Falcon. He was charged, tried and convicted of second-degree murder, but this conviction was later set aside on grounds that he had been deprived of effective legal representation and a speedy trial. The reversal of this conviction nullifies this incident as evidence in aggravation, but is, nevertheless, material in demonstrating that the defendant's conduct in prison is not a source of mitigation with respect to the sentencing issue before the Court. (State's Exhibit 63)

g. During the course of the trial of this cause, defendant admitted at his own instance that immediately

after his release from Montana State Prison on March 28th, 1975, he began selling drugs illegally in Butte, Montana in flagrant violation of the laws of this state.

By reasons of the foregoing, the credit in mitigation allowed by Section 95-2206.9(1) is not appropriate to this defendant.

3. That there is no evidence appearing, either in the record of the trial held in this cause or the special sentencing hearing accorded, supporting a finding of circumstances in mitigation under any of the other numbered paragraphs of Section 95-2206.9 and there is, likewise, no evidence generally justifying the finding of any other facts in topic areas other than those enumerated in the numbered paragraphs of said section which are operative to mitigate the penalty in this cause.

4. That the facts appearing qualify the defendant for treatment as a persistent felony offender as defined in Section 95-1507, namely, that he admits he is the same person who was convicted of assault in the first degree in the above-entitled court on October 29th, 1971, for which he received a five-year sentence, with less than five years having transpired between the commission of the present offense on April 5th, 1975, and such prior felony conviction. Also, that the defendant was 32 years of age at the time of the commission of the present offense, he having been born on June 20, 1942. Further, that the procedural requirements set forth in Section 95-1506 have been accomplished. Notice of intent to seek increased punishment was served upon the accused or his attorney on the 27th day of December, 1977. The notice specified the prior conviction alleged to have been incurred by the accused,

it was not made public nor in any manner made known to the jury before their verdict, and the notice, together with proper proof of timely service, was filed with the Court before the time fixed for sentencing, with the accused having had three days' notice of the sentencing date.

5. That at the conclusion of the prior trial of this cause, the sentence imposed by the then-presiding judge for the crime of deliberate homicide was imprisonment for a period of 100 years. That in the course of the trial resulting in the verdicts upon which sentence is being imposed with these presents, additional evidence having significance concerning the defendant's conduct in connection with the commission of these offenses and having significance as to the character traits of the defendant relating to his lack of regard for human life appeared and it was evidence that was not before the Court at the time of the prior trial and sentencing. Specifically, the defendant testified on his own behalf during the present trial, allowing for an assessment of the defendant in all ways that viewing demeanor and the manner and content of testimony can be productive of insight into the character of a witness. Also, an entirely new witness, Christine Fetters, defendant's girlfriend during the entire time from defendant's release from prison on March 28th, 1975, to his arrest in Spokane, Washington, on June 3rd, 1975, yielded information concerning the conduct of the defendant during the time period when the crimes here involved were planned and executed, as well as during their travelling subsequent to the commission of the crimes. This included further and more definite affirmation that it was the defendant, who, yielding *sua sponte* to

his lack of regard for human life, fired the fatal shots into Monte Dyckman's head, much to the consternation of the other participants to the crime who were upset at a robbery being escalated into murder. Also included are the actions of the defendant in burying the murder weapon used against Dyckman and thereafter arming himself again with another handgun and carrying it with him during the course of their constant travelling to "blow their way out," or language to that effect, in the event anyone should stop them. Further, there is the evidence of subtly phrased language in a letter to Christine Fetters after his apprehension, which language could only be interpreted as threats against the lives of her children because of defendant's erroneous assumption that Christine Fetters had been the cause of his arrest.

Further, it is apparent from a review of the record of the prior trial that contentions had been asserted that the penalty provision for the crime of deliberate homicide was constitutionally defective and the presiding judge several times suggested that he could avoid that constitutional question simply by not imposing the death penalty in the event of a conviction of such charge, and this feeling obviously attended the judge's considerations even up to the time of actually pronouncing sentence, as is evident from the copy of that portion of the transcript which is attached hereto as Exhibit "A" and "A-1." Thus, the 100-year sentence was not arrived at because of its appropriateness to the characteristics of the defendant, but, rather, according to the legal limitations the judge then felt were in force. Changes in the law, nullifying the

prior constitutional concerns, have since been accomplished and that fact, coupled with the new and illuminating evidence appearing in the latest trial bearing upon the life, health, habits, conduct and mental and moral propensities of the defendant, do constitute objective information concerning identifiable conduct on the part of the defendant, and its emergence post-dates the time of the original sentencing.

CONCLUSIONS

The Court concludes as follows:

1. That two of the aggravating circumstances set forth in Section 95-2206.8, being paragraphs (4) and (7), exist in that the defendant committed the offense of deliberate homicide and that when this offense was committed the defendant was lying in wait or ambush, and that the defendant committed the offense of aggravated kidnapping and it resulted in the death of the victim, Monte Dyckman.

2. That none of the mitigating circumstances listed in Section 95-2206.9 exist.

3. That the accused is a persistent felony offender as defined by Section 95-1507 and, therefore, is eligible to be imprisoned in the Montana State Prison for a term of not less than five years or more than 100 years for having been convicted of the crime of robbery.

From the foregoing Findings and Conclusions, the Court now renders its

as follows:

1. The defendant, Bernard James Fitzpatrick, having been found guilty of the crime of deliberate homicide by a jury on March 2nd, 1978, and the Court having specifically found that the aggravating circumstances set forth in Section 95-2206.8(4) exists in relation to this offense and that no circumstances exist in mitigation of the penalty and that objective information concerning identifiable conduct on the part of the defendant justifying an increase in the severity of sentence for this offense appears through evidence adduced during the second trial and subsequent to the original sentencing, the defendant, Bernard James Fitzpatrick, is hereby sentenced to death for the crime of deliberate homicide. Said punishment is to be inflicted by hanging Bernard James Fitzpatrick by the neck until he is dead between the hours of 6:00 A. M. and 6:00 P. M. on the 31st day following completion of the automatic review of this case by the Montana Supreme Court. The execution of said sentence shall be supervised by the Sheriff of Yellowstone County pursuant to Section 95-2303.[1]

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[1] This increase in sentence from the 100 years previously given admittedly raises a question for consideration upon review. *North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072,* allows for the imposition of a greater sentence in the light of events subsequent to the first trial that may throw new light upon the defendant and such information may come to the judge's attention from evidence adduced at the second trial itself, as well as other sources. At the same time, in requiring

(Continued on following page)

2. The defendant, Bernard James Fitzpatrick, having been found guilty of the crime of aggravated kidnapping by a jury on March 2nd, 1978, and the Court having specifically found beyond a reasonable doubt that the aggravating circumstances set forth in Section 95-2206.8(7) exist in relation to this offense, and that no circumstances exist in mitigation of the penalty, the defendant, Bernard James Fitzpatrick, is hereby sentenced to death for the crime of aggravated kidnapping. Said punishment is to be inflicted by hanging Bernard James Fitzpatrick by the neck until he is dead between the hours of 6:00 A. M. and 6:00 P. M. on the 31st day following the completion of the automatic review of this case by the Montana Supreme Court. The execution of said sentence shall be supervised by the Sheriff of Yellowstone County pursuant to Section 95-2303.

(Continued from previous page)

that a more severe sentence must be accompanied by a showing of the reasons for the increase in severity, the reasons " . . . must be based upon objective information concerning identifiable *conduct* on the part of the defendant *occurring after* the time of the *original* sentencing proceeding." (Emphasis supplied) The question then is whether the judge can act only upon subsequently occurring conduct, or whether he can act upon new information concerning past conduct which was not known to the judge at the time of the prior sentencing. I have interpreted the *Pearce* decision as being aimed at preventing vindictiveness against a defendant for having successfully attacked his first conviction, and therefore have concluded that the evidence necessary to justify a more severe sentence can come from new information about the defendant's conduct in the commission of the crime, i.e., past conduct, as well as from new conduct occurring after the original sentencing. Admittedly, there has been no new conduct relevant to that issue in this case.

3. The defendant, Bernard James Fitzpatrick, having been found guilty of the crime of robbery by a jury on March 2nd, 1978, and the Court having found factually and legally that the defendant is a persistent felony offender, the defendant is hereby sentenced to be imprisoned in the Montana State Prison for a term of 100 years for the crime of robbery. The defendant is remanded to the custody of the Yellowstone County Sheriff to be transported by him to the Montana State Prison immediately to await the final order of this Court pertaining to the execution of the remainder of the sentence herewith imposed. The defendant is to receive credit for time served, from the date of his initial incarceration on these charges on June 3rd, 1975, to the date of this judgment.

Dated this 5th day of April, 1978.

/s/ Charles Luedke
CHARLES LUEDKE
DISTRICT JUDGE

cc: James E. Seykora
John L. Adams, Jr.

APPENDIX D

STATE v. FITZPATRICK

Cite as, Mont., 606 P.2d 1343

The STATE of Montana, Plaintiff and Respondent,

v.

Bernard James FITZPATRICK, Defendant and Appellant.

No. 14422.

Supreme Court of Montana.

Submitted Oct. 30, 1979.

Decided Feb. 7, 1980.

Dissenting Opinion On Denial of Rehearing Feb. 21, 1980.

After remand, 569 P.2d 383, defendant was convicted before the Thirteenth District Court, Big Horn County, Charles Luedke, J., of deliberate homicide, aggravated kidnapping and robbery and was sentenced to death for the homicide and kidnapping offenses, and he appealed. The Supreme Court, Sheehy, J., held that: (1) state witness' testimony in which he repeated person's statements on night of the crime, including statement that "[defendant] didn't have to shoot the kid. Boom, boom he shot his head off," was not hearsay; (2) admission of such testimony did not violate defendant's constitutional right of confrontation; (3) permitting sheriff to testify in regard to his opinion that handgun was buried under parking lot was error, but the error did not affect substantial rights of defendant so as to warrant reversal; (4) fact that defendant was sentenced to only 100 years' imprisonment at his original trial did not preclude sentencing him to death

at new trial in which he was reconvicted; (5) fact that defendant, who committed the crime at a time when death sentence was not in existence for such crimes because sentencing statutes were unconstitutional, was sentenced to death under amended statutes in effect at time of trial was not an unconstitutional ex post facto application of the laws; (6) death sentence was not excessive or disproportionate to penalty imposed in similar cases; and (7) giving instruction pertaining to inference that person ordinarily intends natural probable consequences of acts knowingly done was not error.

Affirmed and remanded.

Shea, J., affirmed in part and dissented in part and filed opinion.

John L. Adams, Billings (argued), for defendant and appellant.

Mike Greely, Atty. Gen., Helena, Mike McCarter, Asst. Atty. Gen., Helena (argued), James Seykora, County Atty., Hardin, for plaintiff and respondent.

SHEEHY, Justice.

A jury sitting in District Court, Yellowstone County, found Bernard James Fitzpatrick guilty of deliberate homicide, aggravated kidnapping and robbery. Fitzpatrick was sentenced to death for the crimes of deliberate homicide and aggravated kidnapping and to 100 years imprisonment for robbery by the Honorable Charles Luedke, district judge. The case is before this Court pursuant to the automatic review provisions of section 95-2206.12, R.C.M. 1947, now section 46-18-307 MCA, and the direct appeal of Fitzpatrick.

Before the homicide, Bernard James Fitzpatrick (defendant), had been imprisoned in the Montana State Prison until March 28, 1975. Upon his release, defendant was greeted by two companions, Christine Fetters and Paul Manning. They provided defendant with transportation to Butte, Montana. Manning gave defendant a handgun. A few days later, Christine Fetters and the defendant traveled by bus to Billings, Montana.

On the morning of April 5, 1975, defendant was playing pool with Travis Holliday in the Standard Bar in Billings, when two men, Paul Bad Horse Jr. and Edwin Bushman, entered the bar. Bad Horse recognized Holliday and the two men conversed briefly. Shortly thereafter, introductions were made and the four men proceeded to play several games of pool. While playing pool, they discussed the feasibility of robbing the Safeway store in Hardin, Montana. Defendant picked up a napkin, drew lines on it to represent streets, and asked the others where the Safeway store and bank were located. "X's" were made in the appropriate places on the napkin. Bad Horse explained that an employee left the store at 10:00 p.m. each night and went to the local bank to make the night deposit.

After the discussion Bushman (who was driving his girlfriend's car) and Bad Horse agreed to take Holliday and defendant to a home on the west side of Billings. En route to the west side home, three teenage girls were picked up at Holliday's request. The defendant, gave directions to a residence on the south side of Billings, went into the residence and came out soon thereafter, placing what appeared to be a gun under his belt.

The four men and three girls arrived at the west side home at approximately 6:00 p. m. Once inside, Holliday and the defendant introduced the others to Gary Radi. As additional plans for the robbery were being made, defendant revealed the handgun he had placed under his belt. While the others examined the .45 caliber automatic, the defendant cautioned them to be careful because it was loaded.

Holliday asked Bushman for a ride to Hardin and Bushman agreed to do so. It was planned that Radi and defendant would take Radi's car (a metallic blue 1971 Pontiac) to Hardin and Holliday would travel with Bushman and Bad Horse. With one of the teenage girls in Radi's car and the other two girls in Bushman's car, the five men met in front of the Standard Bar in Billings. Again Holliday asked Bushman to provide transportation for the girls and Bushman agreed to take them to Hardin. The girl in Radi's car left the group at the Standard Bar. The parties agreed to meet at a filling station near Billings near the entrance to the interstate highway before departing to Hardin.

They arrived in Hardin at approximately 8:00 p. m. The girls were taken to the Becker Bar at Holliday's request. The five men then toured the downtown area in Bushman's car. They drove past the drive-in bank and the Safeway store. When they returned to the Becker Bar, Holliday, Bad Horse, Radi and the defendant got into Radi's car and drove to the Safeway store while Bushman returned his girlfriend's car to his house in Hardin, and picked up his own car which contained a piece of rope in the trunk.

Bushman drove his car to the Safeway store. He cut the rope into two pieces approximately three and one-half feet in length and gave them to the defendant. The five men sat in the cars in front of the store until it closed at 10:00 p. m. When Everett Stoltz, the store manager, came out and drove away in a four wheel drive vehicle, Radi and defendant followed him. Monte Dyckman, the assistant store manager, came out of the store soon after and drove away in a pickup. Bushman, Bad Horse and Holliday followed him.

Everett Stoltz drove directly to his home, and Radi and defendant, realizing that Stoltz would not be making the night deposit, then drove to the drive-in bank located on the opposite corner from Stoltz's house. The men had agreed previously should either car follow the wrong employee, the occupants would go to the bank and wait for the deposit to be made.

Monte Dyckman stopped at the post office before turning onto the street to the bank. When the men in Bushman's car saw Dyckman turn into the drive-in bank, Holliday stated, "They've got him now." Bushman then drove to a filling station to prepare for the trip back to Billings.

At approximately 10:30 p. m., witnesses observed the Dyckman vehicle traveling at a high rate of speed down a major street in Hardin. Two persons were in the truck, a driver and a passenger slumped against the right-hand door. Following close behind Dyckman's vehicle was a dark blue car. Soon thereafter, a man driving on the interstate highway was passed by a truck (he recognized as belonging to Monte Dyckman) and a car following

Dyckman's vehicle. The vehicles were moving at a high rate of speed. They turned off the highway and stopped near a section of the highway known as the Toluca interchange.

In the early morning hours of April 6, 1975, Under Sheriff John Fergerson noticed the reflection of a taillight on a vehicle parked behind a gravel pile near the Toluca interchange. Fergerson approached the vehicle and recognized Monte Dyckman lying on the passenger seat with his hands tied behind his back. Monte Dyckman was dead. He had been shot twice with a gun held less than six inches from his head. Fergerson also noticed numerous footprints around Dyckman's truck and tiretracks leading into the area. A subsequent search of Dyckman's car revealed two .45 caliber brass shell casings.

Bushman, Holliday and Bad Horse arrived at Radi's house in Billings at approximately 2:30 a. m., April 6, 1975. Eventually, Radi returned without the defendant and the four men went inside to discuss the robbery. Radi explained that defendant grew tired of waiting for the store employee at the drive-in bank and had stepped out of the car, pulling off his mask. About that time Dyckman turned into the drive-in bank, stepped out of his car, and was seized by Radi and defendant. When asked how much money was taken, Radi stated that the bag contained only $200 in cash and some food stamps and checks. Radi told the others, "Fitz didn't have to shoot the kid. Boom, boom, he shot his head off." "Fitz" is identified as the defendant.

In the meantime, the defendant telephoned Christine Fetters at the home of his sister. Defendant instructed Christine Fetters to purchase two bus tickets to Butte and meet him at the bus depot. While Christine Fetters was standing in line waiting to board the bus at 6:00 a. m., defendant walked into the depot. The couple boarded the bus and returned to Butte that morning. Defendant was apprehended two months later, on June 3, 1975, in Spokane, Washington, by a special agent of the Federal Bureau of Investigation.

The State of Montana filed an information charging Bushman, Bad Horse, Holliday, Radi and defendant with deliberate homicide, aggravated kidnapping and robbery. Trial was held in Billings, in October 1975. Bushman testified in behalf of the State and was granted immunity from prosecution. Radi and defendant were found guilty of all charges. Bad Horse and Holliday were found guilty of robbery.

On October 29, 1975, Radi and defendant were each sentenced to 100 years imprisonment for the crime of deliberate homicide; 100 years imprisonment for the crime of robbery; and death by hanging for the crime of aggravated kidnapping. Bad Horse and Holliday were each sentenced to 40 years for the crime of robbery.

This Court reversed the judgment of conviction of the defendant on July 29, 1977. A new trial was ordered. See *State v. Fitzpatrick* (1977) Mont., 569 P.2d 383, 34 St.Rep. 736.

Defendant was retried individually in February 1978. Again, defendant was found guilty of deliberate homicide, aggravated kidnapping and robbery. On April 5,

1978, the District Court sentenced defendant to death for the crime of deliberate homicide, to death for the crime of aggravated kidnapping and to 100 years imprisonment for robbery.

Defendant's case was certified to this Court on July 31, 1978, pursuant to section 95-2206.12, R.C.M.1947, now section 46-18-307 MCA, which subjects the judgment of conviction and sentence of death to automatic review.

On direct appeal, defendant raises six issues, comprising four evidentiary questions and two questions concerning the death penalty. They are:

(1) Did the District Court err in permitting Bushman to repeat statements allegedly made by Radi on the night of the crime, when Fitzpatrick was not present?

(2) Did the District Court err in permitting Sheriff Robert Brown to give his opinion as to where a gun may have been buried?

(3) Did the District Court err in admitting into evidence the shell casing taken from Radi's vehicle some ten weeks after Dyckman's body was found, without requiring a foundation to connect defendant with the vehicle during the interim?

(4) Did the District Court err in refusing to grant defendant's motion for acquittal due to insufficiency of evidence at the close of the State's case?

(5) Did the District Court err in sentencing defendant to death for the crime of deliberate homicide, such penalty being an increase in the sentence previously imposed by the District Court in the first trial?

(6) Did the District Court err in sentencing defendant to death for the crime of aggravated kidnapping because the statute under which the sentence was imposed was unconstitutional at the time of the crime?

Issue 1. The State presented the District Court with two independent rationales under the rules of evidence for allowing Edwin Bushman to repeat statements made by Gary Radi on the night of the crime. Rule 801(d)(1)(A), Mont.R.Evid. provides: "(d) Statements which are not hearsay. A statement is not hearsay if – (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony . . . " Rule 801(D)(2)(E), Mont.R.Evid., says, " . . . A statement is not hearsay if . . . (2) Admission by a party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

To lay a foundation for Bushman's testimony, prosecutors for the State called Radi to the stand and questioned him extensively concerning statements he allegedly made in his house on the night of the crime. For example, the following dialogue appears in the transcript:

> "Q. At any time at your house that early morning hours of April 6th, 1975, did you discuss the robbing of the Safeway Store in Hardin, Montana? A. Never.
>
> " . . .
>
> "Q. Did you say anything or have a discussion with anyone about the death or the shooting of anyone? A. No." Tr. Vol. II, at 248-249.

On cross-examination by defense counsel, Radi reaffirmed that the answers he had given on direct examination were the truth. Having laid a foundation for the introduction of Radi's prior inconsistent statements, the State called Edwin Bushman to the stand. Bushman testified that Radi described the crime to Holliday, Bad Horse and himself during the early morning hours of April 6, 1975. Radi allegedly told the others that he and the defendant abducted the store employee at the drive-in bank, that defendant was upset because there wasn't much money in the bag, and that defendant had shot a hole through the windshield of Radi's car. Ultimately, Radi described the homicide by saying, "Fitz didn't have to shoot the kid. Boom, boom, he shot his head off."

Although Rule 801(S)(1)(A), was based on Federal Rule 801(d), it differs from its federal counterpart in one important respect. The Federal rule requires that the prior inconsistent statement was one "given under oath subject to the penalty of perjury at a trial or hearing, or other proceeding, or in a deposition." The Montana rule, in the words of the Commission on Rules of Evidence, "deletes the oath requirement as unnecessary and harmful to the usefulness of the rule." Therefore, applying the circumstances here to Rule 801(d)(1)(A), Bushman's testimony is not hearsay because Radi, the declarant, testified at trial and was subjected to cross-examination concerning the prior statement, which was inconsistent with his testimony. The testimony is admissible despite the fact that Radi's prior statements were made in his own home rather than in a legal proceeding under oath.

In this Court, defendant contends the State was allowed to call Radi as a witness, knowing he would deny

making the statements, and was then allowed to impeach Radi without showing surprise in the change. Defendant fails to consider Rule 607, Mont.R.Evid.:

> "Rule 607. Who may impeach; party not bound by testimony.
>
> "(a) The credibility of a witness may be attacked by any party, including the party calling him.
>
> "(b) No party is bound by the testimony of any witness."

We adopted the Rules of Evidence on December 29, 1976, and ordered the effective date for implementation of the rules to be July 1, 1977, for all trials held thereafter. 34 St.Rep. 302A. The Commission Comment following Rule 607 discusses the issue of surprise:

> " . . . A requirement exists, both at common law and under Montana cases, that before one's own witness could be impeached by prior inconsistent statement, the party had to show surprise at the change and that the change had caused prejudice to his case. *State v. Bloor*, 20 Mont. 574, 584, 52 P. 611 (1898); *State v. Willette*, 46 Mont. 326, 330, 127 P. 1013 (1912); and *State v. Kinghorn*, 109 Mont. 22, 36, 93 P.2d 964 (1939). These requirements have also been applied to impeachment by contradiction. *Dick v. King*, 73 Mont. 456, 459, 236 P. 1093 (1925). However, the requirements have been liberally construed so that the surprise does not have to take place while the witness is on the stand, but may occur before testimony is given. *State v. Clark*, 87 Mont. 416, 420, 288 P. 186 (1930) and *State v. Kinghorn*, supra.
>
> "Subdivision (a) is consistent with Rule 43(b), M.R.Civ.P., allowing a party to impeach and not be bound by the testimony of a hostile witness or adverse party. It is also consistent with Rule 26(d)(1), M.R.Civ.P., allowing impeachment of any witness with his deposition.

"Therefore, under existing Montana law, a party can impeach his own witnesses by contradiction or prior inconsistent statement where he shows surprise and prejudice, or where the witness is hostile or the adverse party. As a practical consideration, it is likely that a party can impeach his own witness as the need arises under the existing Montana law. The effect of this rule is simply to remove these artificial requirements by abolishing the traditional rule. This also somewhat broadens the methods of impeaching one's own witness.

"The corollary to the traditional rule not allowing impeachment of one's own witness, that a party is bound by the testimony of his witness, is contained in Montana case law. *Tebay Land and Livestock Co. v. Hastie*, 64 Mont. 509, 517, 210 P. 605 (1922); *Sommerville v. Greenhood*, 65 Mont. 101, 120, 210 P. 1048 (1922); and *Welch v. Nepstead*, 135 Mont. 65, 75, 337 P.2d 14 (1959). The rule expressed by these cases is inconsistent with the idea that a party may impeach his own witness, for a party cannot be bound by testimony he has impeached. Therefore, to the extent that these cases are inconsistent with subdivision (b) of this rule, they are expressly superseded."

Radi's prior inconsistent statements were properly admitted into evidence under Rule 801(d)(1)(A), Mont.R.Evid. and could be considered as substantive evidence by the jury. Advisory Committee's Note 56 F.R.D. 183, 296 (1972); See also: Commission Comment, Rule 801, Mont.R.Evid.

Turning to the State's second rationale for admitting Bushman's testimony, defendant contends any conspiracy that may have existed in this case ended before Radi made the statements in his home. Three United States Supreme Court cases – *Lutwak v. United States* (1953), 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593; *Krulewitch v. United*

States (1949), 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 790; and *Fiswick v. United States* (1946), 329 U.S. 211, 67 S.Ct. 224, 91 L.Ed. 196; – are cited for the proposition that hearsay declarations of a conspirator made after the conspiracy terminated are inadmissible against coconspirators. But had the conspiracy in defendant's case ended? In *Fiswick* and *Krulewitch*, the statements had been made by the conspirators after they had been arrested, and this fact persuaded the Supreme Court to find that the conspiracies had ended. In *Lutwak*, the Supreme Court searched the record, found only one instance where a declaration made after the conspiracy had ended was admitted, and held the error to be harmless. However, in this case, the statement was made approximately four hours after Monte Dyckman was robbed and killed and during the first rendezvous of the conspirators following the crime. The transcript is replete with evidence of a conspiracy that extended for weeks after the statement was made on the night of the crime. Christine Fetters recalled a conversation that took place approximately one week after the shooting that reveals the on-going cooperation of the conspirators in an effort to accomplish their criminal goal:

> "Q. Now, what is the first point in time when you heard conversations or were present when conversations were taking place between Mr. Radi and Mr. Holliday and Mr. Fitzpatrick? A. Well, that would be in Gary's home after the second trip. It would have been on the third trip to Billings.
>
> "Q. This is in April now. A. Oh, yes.
>
> "Q. As I recall, you testified before it was around the middle of April; is that right? A. I think it was around the middle of April, right.

"Q. And who was present when those conversations were taking place? A. Well, there was different people different times.

"Q. Let's talk about the first conversation. A. That was in Gary Radi's house with the two younger girls and what I think was an Indian.

"Q. And what was said at that time? A. Mr. Holliday asked him why he didn't follow him back from Hardin.

"Q. Asked who? A. I guess he was talking to Gary. Gary answered. He asked why they didn't follow him back from Hardin and he said that they didn't think he was coming, then they seen that he was late. They didn't have time to put the masks on.

"Q. Mr. Radi said that to Mr. Holliday in Mr. Fitzpatrick's presence, is that correct? A. Yes.

"Q. Were there any other conversations that took place at this point in time? A. (No response.)

"Q. At the Radi house when those persons were present. A. Well, just that the – He said, 'The crazy son-of-a-bitch blew his head off' around about that time.

"Q. Was there anything discussed or said about money, receipts, at that time? A. Yes, he said – Mr. Holliday looked at Radi and asked him 'How much money did you get?' He said, 'It was mostly checks and food stamps.'

"Q. What was Mr. Holliday's reaction to that? A. He acted very perturbed, pissed off.

"Q. Now, was there a second conversation that was had in your presence and in the presence of Mr. Fitzpatrick and Mr. Radi in regard to this transaction? A. To what transaction?

"Q. Well, in regard to the Hardin murder. A. Well, that's when we were going into the Holiday Inn.

"Q. And who was present at that time? A. There was a blonde girl but I'm positive her name was Bonnie, myself, Fitz and Gary Radi.

"Q. And what was said at that time? A. Something about 'Did you think we went far enough?' Something about sand dunes, sand pits. I don't remember the exact words.

"Q. Who made that statement? A. Gary Radi.

"Q. Who was he making it to? A. Fitz.

"Q. What did he say, again? A. Just that did you think we want far enough to the sand dunes or sand pits or something like that.

"Q. What did Mr. Fitzpatrick say? A. He never said nothing. Just like a look to shut up.

"Q. Was there anything else said at that time? A. Something about a – Let me try to figure and get this straight.

"(Pause.)

"A. Something about 'Don't you think one would have been enough?'

"Q. And Mr. Radi was saying that to Mr. Fitzpatrick? A. Yes.

"Q. And what did Mr. Fitzpatrick say, if anything? A. He acted disgusted. I think, you know, the idea I got is he wanted him to shut up.

"Q. Was there anything else said about a gun being hot at that time? A. I think he said, he asked him if –

"Q. Who is 'he' now, again? A. Gary Radi said, 'What did you do with it?' And he said, 'Don't worry about it. I buried it.'

"Q. Mr. Fitzpatrick said that. A. Yes, that was his answer." Tr. Vol. V, pp. 1012-1015.

The conspiracy was still viable a week after the robbery and homicide was committed. Therefore, Radi's statements on the night of the crime were made "during the course and in furtherance of the conspiracy." Finally, defendant challenges the admission of Radi's statements under either of the hearsay exceptions as violating his constitutional right to confront the witnesses against him, guaranteed by the Sixth Amendment to the Constitution of the United States and the 1972 Mont.Const., Art. II, § 24.

Fitzpatrick was not charged with engaging in a conspiracy in this case, but it is not necessary that the charge of conspiracy be made. Evidence of the conspiracy is admissible, not "for the purpose of allowing a conviction of a crime not charged, but to lay a foundation for the admission of evidence." *State v. Dennison* (1933), 94 Mont. 159, 163, 21 P.2d 63, 64. In its instruction no. 27 in this case, the court told the jury, without objection (no objection could have been sustained in this case), that if two or more persons agree to commit a crime, each person in the agreement is held responsible for all the consequences which might reasonably be expected to flow from carrying into effect the unlawful agreement, including a death not specifically intended. As this Court said in *State v. Dennison*, supra, 94 Mont. at 163, 21 P.2d at 64, where two or more persons are present at the scene of a crime, with no disinterested eyewitness available, it is important to establish, if possible, concerted action. In the absence thereof all may escape just punishment because of the State's inability to prove which one of those present was the actor in the crime. Proof therefore of a preconceived

plan or design is necessary, not to prove the conspiracy, but to connect those present with the crime committed.

This Court, in *State v. Fitzpatrick*, supra, granted defendant a new trial on the charges at hand because he had been denied the right to confront Radi on cross-examination before the trier of fact. Radi and defendant were codefendants in the initial trial and Radi did not testify. *Bruton v. United States* (1968), 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476, controlled. In *Bruton*, codefendants Bruton and Evans had been tried jointly and convicted of armed postal robbery. During the trial a postal inspector testified Evans confessed that Bruton and Evans committed the robbery. Evans' conviction was reversed because his *Miranda* rights had been violated. Bruton's conviction was upheld by the Court of Appeals, Eighth Circuit, 375 F.2d 355, on the theory the trial court sufficiently instructed the jurors not to consider Evans' confession as evidence against Bruton. The Court relied on *Delli Paoli v. United States* (1957), 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278, which approved this procedure. The United States Supreme Court, overruling *Delli Paoli*, reversed Bruton's conviction and challenged the assumption that the prejudicial effect of such testimony could be overcome by jury instructions. The Court determined that substantial weight was added to the government's case in a form not subject to cross-examination (because Evans, the declarant, did not testify). Therefore, Bruton's Sixth Amendment right to confront witnesses against him was violated, and the violation was not cured by the trial court's instruction.

The circumstances in *Bruton* were virtually the same as those in defendant's first trial. Five defendants were

tried jointly, and Bushman, under a grant of immunity from prosecution, repeated, under oath, statements by Radi inculpating defendant. Because defendant was denied the right to confront Radi on cross-examination and the District Court's cautionary instruction to the jury was insufficient to eliminate the prejudice, we reversed.

Bushman repeated Radi's statements at defendants second trial, but after Radi himself had testified and denied making the statements. Radi was also called as a witness by defendant and again Radi denied making any statements concerning the robbery and homicide on the night of the crime. Nonetheless, defendant argues his constitutional right of confrontation was violated by the introduction of Bushman's testimony. Two cases – *California v. Green* (1970), 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489; and *Nelson v. O'Neill* (1971), 402 U.S. 622, 91 S.Ct. 1723, 29 L.Ed.2d 222; – are on point.

In *Green*, a minor testified at the defendant's preliminary hearing, naming the defendant as his supplier of marijuana. At trial, the minor, despite admitting he made the earlier statement, claimed he was uncertain how be obtained the marijuana because he was on LSD at the time. The prior inconsistent statements were admitted as substantive evidence. The defendant was convicted and the District Court of Appeal reversed, holding the use of the prior statements for the truth of the matter asserted therein denied defendant his right of confrontation. The California Supreme Court affirmed and the United States Supreme Court granted the State's petition for certiorari.

Discussing the origin and development of the Confrontation Clause, the Supreme Court stated:

> "Our own decisions seem to have recognized at an early date that it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause: " 'The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with a jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' *Mattox v. United States*, 156 U.S. 237, 242-243, [15 S.Ct. 337, 339, 39 L.Ed. 409] (1895).
>
> "Viewed historically, then, there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *California v. Green*, supra, 399 U.S. at 157, 90 S.Ct. at 1934-1935.

Defendant's reliance on *Bruton* is misguided. The Supreme Court distinguished *Bruton* in *Green*, saying " . . . The Court again emphasized that the error arose because the declarant 'does not testify and cannot be tested by cross-examination,' 391 U.S. at 136, [88 S.Ct., at 1628,] suggesting that no confrontation problem would have existed if Bruton had been able to cross-examine his co-defendant." 399 U.S. at 163, 90 S.Ct. at 1938. The Court concluded ". . . the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency

between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." 399 U.S. at 164, 90 S.Ct. at 1938. Although the precise holding in *Green* refers to prior statements affirmed by the declarant, the Court in *Nelson*, was faced with a situation in which a codefendant took the stand and denied making a prior confession implicating O'Neil. Responding to a claim that effective confrontation is possible only if the witness affirms the prior statement as his, the Court said ". . . Of course a witness *can* be cross-examined concerning a statement not 'affirmed' by him, . . . " *Nelson v. O'Neill*, supra, 402 U.S. at 627, 91 S.Ct. at 1726, and concluded ". . . that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments . . . " 402 U.S. at 629, 91 S.Ct. at 1727.

Radi, although not a codefendant at defendant's second trial, was called as a witness by the State and denied making the out-of-court statement. He reaffirmed his testimony on cross-examination by defense counsel. Two days later Radi testified for the defense and again he testified favorably to the defendant. Radi stood face to face with the jury on two occasions and was cross-examined by both the State and the defendant concerning the prior statement. Bushman was properly allowed to testify concerning Radi's out-of-court statements and defendant's constitutional right of confrontation was not violated because Radi testified as a witness and was subject to full and effective cross-examination.

Issue II. Christine Fetters testified that one week after the crime she rode with defendant in a car to the outskirts of Billings. Defendant parked the car along the road, took a handgun from underneath the seat, and stepped out of the car. He then walked over an embankment in an open field but out of her sight. When defendant returned approximately fifteen minutes later, he no longer had the gun and his hands were muddy.

Sheriff Robert Brown told the jury that Christine Fetters assisted him in an investigation on February 23, 1978, in which a search for the handgun was conducted. During direct examination the County Attorney asked Sheriff Brown:

> "And were you able to make a determination after your investigation with Christine Fetters where the weapon was probably located?"

Defense counsel objected to the question as calling for the witness' opinion. The objection was overruled and the sheriff responded:

> "Yes sir, it's believed to be under the parking lot of the Metra."

Defendant contends the sheriff was improperly permitted to give his opinion concerning the location of the handgun, and such testimony added credence to Christine Fetter's testimony, resulting in prejudice to defendant.

Rule 701, Mont.R.Evid., states:

> *"Rule 701. Opinion testimony by lay witnesses.*
>
> "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a)

rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue."

The sheriff's opinion was not rationally based on his own perceptions and the District Court should have sustained the objection. However, any error, defect, irregularity, or variance in a criminal proceeding which does not affect substantial rights shall be disregarded. Section 95-2425, R.C.M.1947, now section 46-20-702 MCA. No longer is prejudice presumed when error is shown, and it is for this Court to determine whether an error affects the substantial rights of the defendant. *State v. Byrd* (1910), 41 Mont. 585, 111 P. 407. We will not reverse a judgment for harmless error and the question of whether a particular error is harmful or harmless depends on the facts of the case under review. *State v. Straight* (1959), 136 Mont. 255, 347 P.2d 482.

Cross-examination by defense counsel clarified Sheriff Brown's testimony:

"Q. Mr. Brown, in other words you followed the directions Miss Fetters gave you and arrived at a speculative conclusion as to where the weapon was supposedly at, is that correct? A. That is correct, sir.

"Q. But you didn't find any weapon, did you? A. No, sir, we did not.

"Q. You don't even know that you went to the area, do you? A. By the information she gave us, she was sure it was there.

"Q. She was certain that it was the area in question? A. She said it appeared to be the area that it was left.

"Q. She couldn't be definite, could she? A. No, sir." Tr. Vol. III, at 700, 701.

The weapon that was used to shoot Monte Dyckman was never found. Christine Fetters' testimony concerning defendant's disposal of a handgun was unquestionably relevant. Sheriff Brown's testimony, taken as a whole, reveals that he believed the handgun was located under the parking lot because of information Christine Fetters had given him. We conclude the sheriff's testimony did not affect substantial rights of the defendant.

Issue III. Gary Radi was arrested in Rawlins, Wyoming, on June 27, 1975. His automobile, a 1971 Pontiac Grand Prix, was searched by the deputy sheriff of Carbon County, Wyoming. Approximately 75 to 100 items were taken from the vehicle. Of significance in the recovery was a ski mask found in the trunk and a spent .45 caliber shell casing discovered under the back seat. Defense counsel objected to the introduction of the items at defendant's trial on the grounds that they were irrelevant to a determination of defendant's guilt or innocence. The objections were overruled. In this Court defendant argues the shell casing should not have been admitted into evidence because it was discovered at a point in time too remote from the day of the crime to be of any probative value. Defendant also repeats his objection that the shell casing was irrelevant evidence in his trial because he was not connected with the car during the time between the night of the crime and the day of Radi's arrest. As a practical matter, defendant's argument applies to both the shell casing and the ski mask.

Rule 401, Mont.R.Evid., defines relevant evidence:

"Rule 401. Definition of relevant evidence.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of

> consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant."
>
> The Commission stated this test of relevance:
>
> "The test of relevance is whether an item of evidence will have any value, as determined by logic and experience, in proving the proposition for which it is offered. The standard used to measure this acceptable probative value is 'any tendency to make the existence of any fact . . . more probable or less probable than it would be without the evidence.' This standard rejects more stringent ones which call for evidence to make the fact or proposition for which it is offered more probable than any other. It is meant to allow wide admissibility of circumstantial evidence limited only by Rule 403 or other special relevancy rules in Article IV."

Prior to moving for admission of the shell casing and ski mask, the State presented evidence placing defendant in Radi's automobile, in Hardin, Montana, on the night of the crime. Defendant had a .45 caliber handgun in his possession and he wore a ski mask while he was sitting in Radi's car at the drive-in bank in Hardin. Finally, the testimony showed defendant shot a hole through the windshield of Radi's car with the .45 caliber handgun.

A contention similar to defendant's was made in *State v. Doe* (1965), 146 Mont. 501, 409 P.2d 439, wherein the District Court admitted into evidence two .25 caliber shell casings taken from a car in which the defendant had been riding just before he allegedly shot a man four times with a .25 caliber automatic pistol. Responding to a claim

that a proper foundation had not been laid for the admission of the shell casings, this Court said:

> "In *State v. London*, 131 Mont. 410, 310 P.2d 571, this court held that *any* exhibit having a direct connection with the commission of a crime is admissible.
>
> "In *State v. Allison*, 122 Mont. 120, 133, 199 P.2d 279, 287, we said: 'The applicable rule of law is stated by this court as follows in *State v. Harris*, 66 Mont. 34, 213 P. 215, 217: "* * * the general rule being that weapons found at or near the place of arrest are properly admitted in evidence as a part of the history of the arrest, and as bearing on the crime, although not clearly shown to have been the property of the accused or used in the commission of the crime." '
>
> " ' "Weapons, tools, bullets, instruments, or other articles which appear from other evidence to have been employed in the commission of the crime are admissible in evidence." *State v. Byrne*, 60 Mont. 317, 325, 199 P. 262, 264.' Also 22A C.J.S *Criminal Law* § 712. IV Nichols, *Applied Evidence*, p. 3276, § 341, and V Nichols, *Applied Evidence*, p. 4716, § 9." *State v. Doe*, supra, 146 Mont. at 504-505, 409 P.2d at 411.

The articles here, a ski mask and a shell casing, had been linked to defendant and to the commission of the crime by the State. Indeed, the admission of the articles at defendant's trial had a tendency to make the existence of those facts more probable, and, by definition, were relevant.

As for defendant's argument of remoteness, "the objection that evidence is too remote is directed to the discretion of the [district] court and is a matter that goes to the credibility of the evidence rather than its admissibility [citing cases] unless the remoteness is so great that the proffered evidence has no evidentiary value.

(*State v. Pemberton*, 39 Mont. 530, 104 P. 556; *People v. Boggess*, 194 Cal. 212, 228 P. 448.)" *State v. Satterfield* (1943), 114 Mont. 122, 127, 132 P.2d 372, 373-374.

In *State v. Nelson* (1961), 139 Mont. 180, 186, 362 P.2d 224, 228, we said:

> "In 22 C.J.S. Criminal Law § 638, p. 977, it is stated: 'Whether evidence is inadmissible because of remoteness rests largely in the sound discretion of the trial court, the objection going to the weight of the evidence, rather than to admissibility. In this connection, remoteness has regard to factors other than mere lapse of time, and is to be determined by the circumstances of the case.'
>
> "Wharton's Criminal Evidence (12th ed.), § 149, p. 291, states: 'There is no fixed standard for determining remoteness. It is therefore necessary to consider all the circumstances of the case, the nature of the act indicated or shown by the evidence offered, and the nature of the crime. In any case, the determination of whether evidence is too remote to be relevant is left to the discretion of the trial judge, and his decision will not be reversed in the absence of clear proof of an abuse of that discretion.' "

When the circumstances of defendant's case are considered – witnesses had testified defendant possessed a .45 caliber handgun which he intended to use in a robbery and that he wore a ski mask while waiting in Radi's car at the drive-in bank – we do not find that the District Court abused its discretion by admitting into evidence a ski mask and .45 caliber shell casing taken from Radi's car less than three months after the crime.

Issue IV. When the State rested, defense counsel moved that the court direct the jury to acquit defendant due to insufficiency of evidence. The motion was denied

and defendant alleges error. Specifically, defendant argues that most of the evidence was circumstantial and the remainder was improperly admitted.

Defendant's motion was made under section 95-1909(9), R.C.M.1947, now section 46-16-403 MCA, which provides:

> "(9) When at the close of the state's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, the court may allow the case to be reopened for good cause shown."

The motion for dismissal in criminal cases is often referred to as a motion to acquit or a motion for directed verdict. *State v. French* (1975), 166 Mont. 196, 531 P.2d 373. A directed verdict in a criminal case is granted in this jurisdiction only where the State fails to prove its case and there is no evidence upon which a jury could base its verdict. *State v. Paulson* (1975), 167 Mont. 310, 538 P.2d 339; *State v. Solis* (1973), 163 Mont. 293, 516 P.2d 1157.

The facts recited heretofore were taken from the transcript of the State's case-in-chief. Defendant's challenges concerning Edwin Bushman's testimony, Sheriff Robert Brown's testimony, and the admission of items taken from Gary Radi's car have been determined to be meritless. As for defendant's challenge that most of the evidence was circumstantial, "Circumstantial evidence is not always inferior in quality nor is it necessary relegated to a 'second class status' in the consideration to be given it. The very fact it is circumstantial is not a sufficient allegation to justify a reversal of the judgment for such evidence may be and frequently is, most convincing and

satisfactory." *State v. Cor* (1964), 144 Mont. 323, 326-327, 396 P.2d 86, 88.

". . . In determining the sufficiency of circumstantial evidence to make a case for the jury and to sustain a conviction, all of the facts and circumstances must be taken into consideration collectively." *State v. De Tonancour* (1941), 112 Mont. 94, 98, 112 P.2d 1065, 1067.

When all of the facts and circumstances of the State's case against defendant are considered, including the evidence we have held was properly admitted, an unmistakable conclusion is reached. Defendant purposely kidnapped, robbed, and caused the death of Monte Dyckman. The motion for dismissal was properly denied.

Issue V. Following his initial conviction for deliberate homicide, defendant was sentenced to 100 years imprisonment by the Honorable Nat Allen. The Honorable Charles Luedke sentenced defendant to death for the same crime when he was reconvicted on the charge after a new trial. Judge Luedke imposed the ultimate penalty for three reasons: (1) the defendant testified at the second trial, allowing for an assessment of his character; (2) Christine Fetters, a witness who did not testify at the first trial, yielded considerable information concerning defendant's conduct during the planning and execution of the crime, as well as his action subsequent to the commission of the crime; and, (3) the constitutionality of the death penalty provision for the crime of deliberate homicide was no longer in doubt as it had been when the initial sentence was imposed.

Defendant contends the rule in *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, prohibits the District Court judge from increasing the

sentence for deliberate homicide. In *Pearce*, the United States Supreme Court examined the cases of two defendants who received increased sentences from trial judges after new trials were held pursuant to appellate court decisions. Neither of the trial judges had set forth reasons for increasing the punishment, and the Supreme Court, concerned that the defendants were being penalized for exercising their constitutional rights, said:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.
>
> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." 395 U.S. at 725, 89 S.Ct. at 2080-2081.

Defendant argues that none of the District Court's reasons for increasing the sentence concern "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Therefore, if

the *Pearce* rule applies, defendant's sentence was improperly increased.

The United States Supreme Court has had numerous occasions since the *Pearce* decision to examine the rule against retaliatory sentencing. *Colten v. Kentucky* (1972), 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584, concerned the applicability of the *Pearce* rule to Kentucky's two-tiered system of criminal adjudication. Kentucky allows a misdemeanor defendant who is convicted in an inferior trial court to seek a trial *de novo* in a court of general jurisdiction. The appellant in *Colten* claimed the Constitution prevented the court of general jurisdiction from imposing a sentence in excess of that imposed in the inferior trial court. The Supreme Court rejected the *Pearce* analogy, saying:

> "Our view of the Kentucky two-tier system of administering criminal justice, however, does not lead us to believe, and there is nothing in the record or presented in the briefs to show, that the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system.
>
> "We note first the obvious: that *the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly.* Nor is the *de novo* court even asked to find error in another court's work. Rather, the Kentucky court in which Colten had the

> unrestricted right to have a new trial was merely asked to accord the same trial, under the same rules and procedures, available to defendants whose cases are begun in that court in the first instance . . . " (Emphasis added.) 407 U.S. at 116, 117, 92 S.Ct. at 1960.

See also: *State v. Fissette* (1972), 159 Mont. 501, 498 P.2d 1208, in which we applied the *Colten* rule to our justice and District Court system.

Any question as to whether or not the "possibility of vindictiveness" formed the basis of the *Pearce* rule was resolved in *Chaffin v. Stynchcombe* (1973), 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714, involving the imposition of a higher sentence by a jury upon retrial. In the words of Mr. Justice Powell:

> "Subsequent cases have dispelled any doubt that *Pearce* was premised on the hazard of vindictiveness. In *Moon v. Maryland*, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed. 262 (1970), a case granted with a view to determining the retroactivity of *Pearce*, the Court ordered the case dismissed as improvidently granted when it became clear that there was no claim there that the higher sentence received on retrial was a product of vindictiveness on the part of the sentencing judge. Because counsel for the reconvicted defendant eschewed that contention, the Court held that 'there is no claim in this case that the due process standard of *Pearce* was violated.' *Id.*, at 320, 90 S.Ct. at 1731. A similar focus on actual vindictiveness is reflected in the decision last Term in *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). The question in that case was whether the *Pearce* principle applied to bar the imposition of a higher sentence after a *de novo* trial in those jurisdictions that employ a two-tier system of trial courts. While noting that '[i]t may often be that the [*de novo* "appeal" court] will impose a punishment more severe than that received from

the inferior court,' *id.*, at 117, 92 S.Ct., at 1960, we were shown nothing to persuade us that 'the hazard of being *penalized* for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement.' *Id.*, at 116, 92 S.Ct., at 1960 (emphasis supplied). In short, the Due Process Clause was not violated because the 'possibility of vindictiveness' was not found to inhere in the two-tier system. *Ibid.*

"This case, then, is controlled by the inquiry into possible vindictiveness counseled by *Pearce*, *Moon*, and *Colten*. The potential for such abuse of the sentencing process by the jury is, we think, *de minimis* in a properly controlled retrial. The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence. It has been conceded in this case that the jury was not informed of the prior sentence. We have no reason to suspect that this is not customary in a properly tried jury case. It is more likely that the jury will be aware that there was a prior trial, but it does not follow from this that the jury will know whether that trial was on the same charge, or whether it resulted in a conviction or mistrial. Other distinguishing factors between jury and judicial sentencing further diminish the possibility of impropriety in jury sentencing. As was true in *Colten, the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction. Thus, the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication*. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals." (Emphasis added.) 412 U.S. at 25-27, 93 S.Ct. at 1982-1983.

Finally, in *Blackledge v. Perry* (1974), 417 U.S. 21, 27, 94 S.Ct. 2098, 2102, 40 L.Ed.2d 628, the Supreme Court said,

"[t]he lesson that emerges from *Pearce, Colten,* and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.' "

In defendant's case, the trial judge presiding at the original trial was replaced. The second sentence was not "meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction." The Honorable Charles Luedke had "no personal stake in the prior conviction and no motivation to engage in self-vindication." *Chaffin v. Stynchcombe,* supra, 412 U.S. at 27, 93 S.Ct. at 1983. The Supreme Court has stated that unless threat of vindictiveness is a realistic likelihood, *Pearce* does not apply. Therefore, we conclude that *Pearce* does not apply in defendant's case because the District Court judge was replaced for the new trial and sentencing and he stated his reasons for imposing the death penalty on these charges with clarity.

Issue VI. Finally, defendant contends the death penalty may not be imposed in this case because the sentencing statutes in effect at the time of the crimes were unconstitutional, thereby rendering the death penalty nonexistent for those crimes. The argument arises because the District Court sentenced defendant to death for the crimes of deliberate homicide and aggravated kidnapping under the amended statutory provisions in effect at the time of trial. Defendant argues this procedure amounted to an unconstitutional *ex post facto* application of laws because he received a more severe sentence under the amended statutes that he could have possibly received under the previous statutes.

At the time of the crimes, section 94-5-105, R.C.M.,1947, the sentencing statute for deliberate homicide, stated:

> "94-5-105. *Sentence of death for deliberate homicide.* (1) When a defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:
>
> "(a) The deliberate homicide was committed by a person serving a sentence of imprisonment in the state prison; or
>
> "(b) The defendant was previously convicted of another deliberate homicide; or
>
> "(c) The deliberate homicide was committed by means of torture; or
>
> "(d) The deliberate homicide was committed by a person lying in wait or ambush; or
>
> "(e) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.
>
> "(2) Notwithstanding the provisions of subsection (1) and regardless of circumstances, when a defendant is convicted of the offense of deliberate homicide under subsection (1)(a) of section 94-5-102 in which the victim was a peace officer killed while performing his duty the court shall impose a sentence of death."

This Court held in *State v. McKenzie* (1978), Mont., 581 P.2d 1205, 35 St.Rep. 759, that section 94-5-105, as it existed in January 1974, (which was identical to the statute set forth above, except for subsection (2), making imposition of the death penalty mandatory when the defendant was convicted of deliberate homicide in which the victim was a peace officer killed while performing his

duty) was constitutional on its face. In *McKenzie*, we discussed the three cases cited here by defendant – *Woodson v. North Carolina* (1976), 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; *Coker v. Georgia* (1977), 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 – and concluded that section 94-5-105 withstood scrutiny under the Supreme Court decisions because it allowed for consideration of mitigating circumstances. However, defendant's argument concerning the penalty for deliberate homicide fails to consider *McKenzie* and is therefore without merit.

At the time of the crimes, the sentencing statute for aggravated kidnapping simply stated:

> "94-5-304. *Sentence of death for aggravated kidnapping.* A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as the result of the criminal conduct."

In *State v. Coleman* (1978), Mont., 579 P.2d 732, 35 St.Rep. 560, this Court found section 94-5-304 to be a mandatory death penalty statute and therefore unconstitutional on its face. Since Dewey Eugene Coleman had received the death penalty under the unconstitutional statute, we vacated the sentence and remanded the case to the District Court for resentencing. Coleman was subsequently resentenced to death under amended statutes sections 94-5-303(2) and 95-2206.6 through 95-2206.15, R.C.M.1947, which required the District Court to consider aggravating and mitigating circumstances. On appeal, Coleman argued that the District Court's application of the amended statutes violated the constitutional prohibition against *ex post facto* laws. (See *State v. Coleman* (1979), Mont., 605 P.2d 1000, 36 St.Rep. 1134. We held the District

Court properly sentenced Coleman under the amended statutes because the amendments were ameliorative in nature and therefore did not deprive Coleman of a substantial right or immunity which he possessed at the time the crime was committed.

Defendant's argument concerning the application of the amended sentencing statutes for aggravated kidnapping is identical to the argument advanced by Coleman in this second appeal and is therefore controlled by our decision in that case. See our second opinion in *Coleman* (1979), Mont., 605 P.2d 1000, 36 St.Rep. 1134; and our opinion on rehearing in *Coleman*, Mont., 605 P.2d 1051, dated December 19, 1979.

Having found no error in the manner in which defendant's trial was conducted, nor error in the imposition of the death penalty for the crimes of deliberate homicide and aggravated kidnapping, we hereby affirm the judgment of the District Court.

SENTENCE REVIEW

Section 95-2206.12, R.C.M.1947, now section 46-18-307 MCA directs this Court to review a sentence of death whenever such is imposed by a District Court of this state.

Section 95-2206.15, R.C.M.1947, now section 46-18-310 MCA sets forth the determinations we must make:

> "*Supreme court to make determination as to the sentence.* The supreme court shall consider the punishment as well as any errors enumerated by way of appeal.

With regard to the sentence, the court shall determine:

"(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 95-2206.8 and 95-2206.9; and

"(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration."

A review of the entire record reveals nothing that would indicate that the sentences of death were imposed under the influence of passion, prejudice, or any other arbitrary factor.

The District Court judge concluded that the crime of deliberate homicide had been "committed by a person lying in wait or ambush", which is an aggravating circumstance under section 95-2206.8(4), R.C.M.1947, now section 46-18-303(4) MCA, and that the crime of aggravated kidnapping had "resulted in the death of the victim", which is an aggravating circumstance under section 95-2206.8(7), R.C.M.1947, now section 46-18-303(7) MCA. Discussion of this point is unnecessary, except to state that the evidence in the record clearly proves sufficient aggravating circumstances exist in this case to warrant imposition of the death penalty.

No mitigating circumstances were found by the District Court judge which would call for leniency. Mitigating circumstances are set forth in section 95-2206.9, R.C.M.1947, now section 46-18-304 MCA:

> "*Mitigating circumstances.* Mitigating circumstances are any of the following:
>
> "(1) The defendant has no significant history of prior criminal activity.
>
> "(2) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> "(3) The defendant acted under extreme duress or under the substantial domination of another person.
>
> "(4) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> "(5) The victim was a participant in the defendant's conduct or consented to the act.
>
> "(6) The defendant was an accomplice in an offense committed by another person, and his participation was relatively minor.
>
> "(7) The defendant, at the time of the commission of the crime, was less than 18 years of age.
>
> "(8) Any other fact exists in mitigation of the penalty."

The transcript of the sentencing proceeding reveals defendant's significant criminal history. That history is similarly preserved in the District Court's findings:

> "a. On June 1, 1965, the defendant was charged with assault in the second degree, involving alleged grievous bodily injury upon one Larry Ruff. This case

was dismissed eight months later at the request of the county attorney for the reason that the prosecuting witness could not be located and the case could not be prosecuted further without his testimony. (State's Exhibit 68.)

"b. On August 3rd, 1965, defendant was charged in City Police Court with reckless driving and leaving the scene of an accident. After a jury verdict of guilty, he appealed to the District Court, which was later disposed of by a change of plea to guilty and the payment of a fine. (State's Exhibit 67.)

"c. The defendant was found guilty of assault in the second degree on September 13, 1966, in Billings, Montana, wherein he shot LeRoy Gash seven times in the upper part of the left leg with an automatic pistol, receiving a sentence of six years in the Montana State Prison. (State's Exhibit 66.)

"d. On July 28th, 1971, charges were filed in the Yellowstone County District Court charging the defendant, and others, with the crimes of burglary and criminal possession of dangerous drugs. This cause was dismissed at the request of the county attorney on the ground that 'he (Fitzpatrick) has entered a plea of guilty to another charge,' being the charge described in paragraph following. (State's Exhibit 64.)

"e. On October 29th, 1971, defendant entered a plea of guilty to a charge of assault in the first degree and received a sentence of five years in Montana State Prison. On this occasion the defendant invited one James Prince to step out the back door of the Western Bar in Billings, Montana, and once outside defendant shot Prince in the face with an automatic pistol. (State's Exhibit 65.)

"f. On February 28th, 1973, while confined in the Montana State Prison, defendant was implicated in the death of a fellow inmate, Alfred Falcon. He was

charged, tried and convicted of second-degree murder, but this conviction was later set aside on grounds that he had been deprived of effective legal representation and a speedy trial. The reversal of this conviction nullifies this incident as evidence in aggravation, but is, nevertheless, material in demonstrating that the defendant's conduct in prison is not a source of mitigation with respect to the sentencing issue before the Court. (State's Exhibit 63.)

"g. During the course of the trial of this cause defendant admitted at his own instance that immediately after his release from Montana State Prison on March 28th, 1975, he began selling drugs illegally in Butte, Montana, in flagrant violation of the laws of this state."

None of the specific mitigating circumstances listed under section 95-2206.9 exist in defendant's case, nor do any other facts exist in mitigation of the penalty. Therefore, we uphold the District Court's finding on this point.

Finally, it must be determined whether the sentence of death in the defendant's case is excessive or disproportionate to the penalty imposed in similar cases.

As stated in *Coleman*, it has only been since 1973 that the death penalty could be imposed for the crime of aggravated kidnapping in which the victim is killed. Consequently, we are limited in our comparison of cases to an examination of *McKenzie* and *Coleman*, which are the only cases arising in Montana since the effective date of the aggravated kidnapping statute.

The defendant in *McKenzie* was charged with deliberate homicide and aggravated kidnapping as a result of the bludgeoning death of Lana Harding. The District Court imposed the death penalty for both offenses and

this Court affirmed following remand from the United State Supreme Court. 581 P.2d at 1235. The victim was found draped over a grain drill; partially nude, with a rope tied around her neck, and severely beaten about the head and body. Death had been caused by severe blows inflicted by Duncan Peder McKenzie.

In *Coleman*, the defendant was sentenced to death following the jury's verdict of guilty of the crime of aggravated kidnapping, Dewey Eugene Coleman raped Peggy Harstad, beat her about the head with a motorcycle helmet, attempted to strangle her with a nylon rope, and finally held her in the Yellowstone River until she drowned.

We conclude that the sentence of death for aggravated kidnapping in the defendant's case was not excessive or disproportionate to the penalty imposed in similar cases.

Until January 1, 1974, the jury, or the District Court, if punishment was left to the court, had complete discretion in the sentencing of persons convicted of first degree murder. Ch. 513, § 32, Laws of Montana (1973), codified as section 94-2505, R.C.M.1947. Subsequently, this Court, in *State v. Rhodes and Shields* (1974), 164 Mont. 455, 524 P.2d 1095, declared that two death sentences imposed under section 94-2505 were unconstitutional and therefore invalid because the United States Supreme Court decision in *Furman v. Georgia* (1972), 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, invalidated all death sentences imposed under statutes which lodged unfettered discretion in the judge.

A review of cases such as – *State v. Rhodes and Shields*, supra; *State v. Hatfield* (1973), 163 Mont. 248, 516 P.2d 368; and *State v. Quigg* (1970), 155 Mont. 119, 467 P.2d 692 – reveals that the death penalty was indeed being imposed "wantonly and freakishly" in Montana. 408 U.S. at 310, 92 S.Ct. at 2762. This, the United States Supreme Court held in *Furman*, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. As a result, cases in which the defendant was sentenced under section 94-2505 for the crime of first degree murder are not similar to the case on appeal, in which a constitutional sentencing procedure for the crime of deliberate homicide is involved.

Other cases similar to defendant's are: *McKenzie*, supra, and *State v. Buckley* (1976), 171 Mont. 238, 557 P.2d 283.

The facts in *Coleman* and *McKenzie* have been previously set forth. McKenzie was sentenced to die for the crime of deliberate homicide. We look at *Buckley*, although *Buckley* is really not similar because he was sentenced before the 1977 amendments regarding sentencing in capital cases were adopted.

In *Buckley*, a man named James A. McIntyre was staying at a cabin near Glen Lake, Montana, with the consent of the owner. Gary L. Buckley also received permission to stay at the cabin. However, McIntyre was never informed of this, and upon returning to the cabin on July 3, 1975, he was surprised to be met by Buckley. Believing Buckley to be on the premises unlawfully, McIntyre informed the local police. That night McIntyre returned to the cabin with a Lincoln County Sheriff's

deputy in McIntyre's truck. The deputy was dressed in civilian clothes and carried a gun. After failing to find Buckley, the men met with other law enforcement officers. The officers left the area, but McIntyre and a friend returned to the cabin, and according to Buckley, yelled threats to him to stay away or he would be harmed. Buckley observed all of these events from nearby where he was sleeping for the night because he feared for his life and believed McIntyre was out to get him.

The next day Buckley was reading a book in the cabin when he saw McIntyre's truck approach. The truck went slowly past the cabin and stopped 15 to 20 yards away from it. Buckley, sensing danger, picked up his gun, and went to the door. As he went past the refrigerator, Buckley heard a noise behind him. As he turned, he saw McIntyre holding a rifle waist high. McIntyre leveled the rifle and shot at Buckley, missing him. Buckley fired back, and missed McIntyre. McIntyre began running to his truck, and Buckley continued shooting, wounding McIntyre, knocking him to the ground and causing him to drop the rifle. Buckley continued to walk toward McIntyre, who was lying still at the time, and continued shooting, hitting McIntyre two more times and from less than seven and one-half feet away. Finally, Buckley knelt down and delivered the fatal shot to McIntyre's head from less than a foot away.

Buckley was convicted of deliberate homicide and sentenced to 100 years in prison. His sentencing occurred before the passage of section 46-18-301 through -310 MCA, relating to the death penalty, under which Fitzpatrick was sentenced. However it does not appear that Buckley's crime, serious as it was, included any of

the aggravating circumstances triggering the death penalty under section 46-18-303 MCA.

We conclude that the sentence of death for deliberate homicide in defendant's case was not excessive or disproportionate to the penalty imposed in similar cases.

ADDENDUM

After the hearing before this Court on this second appeal of Fitzpatrick, and before we promulgated our opinion, the decision came down from the United States Supreme Court in *Sandstrom v. Montana* (1979), 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39. In *Sandstrom*, the United States Supreme Court found the trial court's instruction "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutional. 442 U.S. at 515, 99 S.Ct. at 2454, 61 L.Ed.2d at 45.

Because of the possibility that *Sandstrom* might have had an implication for this case, we ordered a further hearing in *Fitzpatrick*, limited to the issues, if any, which had been raised by virtue of the *Sandstrom* opinion. These additional limited issues were briefed by counsel for the State and for the defendant Fitzpatrick, and hearing thereon was had before this Court on October 30, 1979.

We now determine that the instructions given in this *Fitzpatrick* case on the second trial have no *Sandstrom* implications.

In the second *Fitzpatrick* trial, the trial court gave as its instruction no. 13, the following:

> "You are instructed that 'knowingly' or 'purposely' may be proved by circumstantial evidence. It rarely

> can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate that he 'knowingly' or 'purposely' committed the offense or offenses charged.
>
> "It is reasonable to infer that a person ordinarily intends the natural and probable consequences of acts knowingly done, knowingly omitted, purposely done, or purposely omitted. So unless the contrary appears from the evidence, the jury may draw the inference that the defendant intended all of the consequences which one standing in like circumstances and possessing like knowledge should reasonably have expected to result from any act knowingly done, knowingly omitted, purposely done or purposely omitted.
>
> "In determining the issue as to 'knowingly' or 'purposely' the jury is entitled to consider any statements made and acts done or omitted by the defendant, and all facts and circumstances in evidence which may aid in the determination of the state of mind of the defendant."

At the outset we note an important difference between the *Fitzpatrick* instruction and the instruction given in *Sandstrom*. The *Fitzpatrick* instruction is entirely permissive whereas it was the opinion of the United States Supreme Court in *Sandstrom* that the instruction there involved was mandatory. Moreover, in the *Fitzpatrick* instruction, it appears from the face thereof that the connection between the inference which the jury is permitted to draw and the proven facts upon which the inference must be based is both reasonable and logical. See, for comparison, a similar instruction, but differently

phrased in our second opinion on *State v. Coleman*, Mont., 605 P.2d 1051, promulgated December 19, 1979.

In weighing whether the instruction of *Fitzpatrick* has any impermissible unconstitutional effect, it is pertinent to look at the language of the United States Supreme Court in *County of Ulster City v. Allen* (1979), 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777:

> "Inferences and presumptions are a staple of our adversarial system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime – that is, an 'ultimate' or 'elemental' fact – from the existence of one or more 'evidentiary' or 'basic' facts. (Citing authority.) The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. (Citing cases.)
>
> The most common evidentiary device is entirely permissive inference or presumption, which allows – but does not require – the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant. (Citing a case.) In that situation the basic fact may constitute prima facie evidence of the elemental fact. (Citing authority.) When reviewing this type of device, the Court has required the party challenging it to demonstrate its invalidity as applied to him.

> (Citing authority.) Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the 'beyond a reasonable doubt' standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination." 99 S.Ct. at 2224.

Under the *Allen* language foregoing, we examine the *Fitzpatrick* instruction as it was given. Plainly, the instruction does not curtail in any way the jury's duty and freedom to assess the evidence independently. Under the instruction the jury is free to credit or reject the inference.

The defendant is not required to come forward with evidence to overcome the permitted inference. Under this instruction and other instructions given by the court, the duty remains upon the State to prove every element of the crimes charged against Fitzpatrick beyond a reasonable doubt. The *Fitzpatrick* instruction, therefore, meets the first test under *Allen*, because the jury is free to accept or reject the instruction and no additional burden is placed on the defendant as far as coming forward with proof is concerned.

The second test under *Allen* is the application of the instruction to the "beyond a reasonable doubt" standard. This test is met by the instruction unless under the facts of the case there is no rational way that the jury could make the connection permitted by the inference. It is clear from the evidence in this case that it is perfectly rational to infer that Fitzpatrick committed this crime

knowingly or purposely, and thus the instruction meets the second *Allen* test.

A few items of the evidence that connect Fitzpatrick with the crime on which the jury could infer, if need be, that Fitzpatrick committed the crime knowingly and purposely are these: the body of Monte Dyckman itself; the fact that Fitzpatrick went to a house in Billings to get a handgun; the fact that he later displayed the handgun and cautioned others to be careful with it because it was loaded; his otherwise unexplained trip from Billings to Hardin, Montana; the ski mask which was found at the scene of the crime and which was connected with Fitzpatrick; the spent casing from a hand gun which was found in the Monte Dyckman car after the body was discovered; the bits of rope which were used to tie up the victim; the hole in the windshield where it was testified that Fitzpatrick's gun was fired; the flight by Fitzpatrick in the early morning hours to Butte with Christine Fetters; hiding the handgun; and Radi's statement that Fitzpatrick "shot his head off". It is further stated by the United States Supreme Court in *Allen* that the rational connection between the basic facts at the prosecution proved and the ultimate fact which the jury is permitted to presume is valid if it is "more likely than not to flow from" the basic facts proved. *Allen*, 99 S.Ct. at 2228.

It is noteworthy that the decision by the United States Supreme Court in *Allen*, was issued on June 4, 1979 and that *Sandstrom* was issued on June 18, 1979. The closeness in time of these two decisions indicates that in determining the validity of an instruction such as that given in *Fitzpatrick*, it is proper to weigh not only the consequences flowing from the mandatory instruction

given in *Sandstrom*, but also the consequences flowing from permissive instructions as described in *Allen*. The language used by the United States Supreme Court in *Allen* is apropos to the *Fitzpatrick* case. In any event, however, the disputed instruction meets the test derived from *Sandstrom*, because this instruction does not invade the fact-finding duty of the jury nor allocate the burden of proof between the defendant and the State. See the discussion on the effect of *Sandstrom* in *Holloway v. McElroy* (D.Ga.1979), 474 F.Supp. 1363-68.

DISPOSITION

The judgment of the District Court is affirmed and this cause is remanded to the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone for the purpose of resetting the execution date of the defendant Bernard James Fitzpatrick.

HASWELL, C.J., and DALY and HARRISON, JJ., concur.

SHEA, Justice, affirms the convictions but dissents to the imposition of the death penalties in this case.

Concerning the *Sandstrom-type* instruction given in this case, I agree for the most part with the majority analysis. As the opinion makes clear, the instruction given in this case was not a carbon copy of that given in *Sandstrom*. Furthermore, I emphasize here, as I did in *State v. Coleman* (1979), Mont., 605 P.2d 1000, 36 St.Rep. 2237, that the facts of this case are radically different from those existing in *Sandstrom*. Here, as in *Coleman*, the

defense was alibi. The jury had a choice of either believing Fitzpatrick's alibi, or not believing it. The jury chose not to believe it. In *Coleman*, there was direct evidence by accomplice Nank that defendant Coleman participated in the kidnapping, rape and homicide. Here, the evidence is more indirect in that there is no eyewitness testimony to the crime itself. Nonetheless, once the jury chose not to believe the alibi of defendant Fitzpatrick, there was abundant evidence by which it could convict him of the crimes charged. A *Sandstrom-type* instruction would not have aided the State's case in this regard.

I. THE BACKGROUND OF THE DEATH PENALTY MORASS:

The defendant has become ensnared in a death penalty morass that has gone far past nightmarish proportions. The legal quagmire can perhaps be best understood if the background of the death penalty problem is set forth in relation to the first appeal and then to the present appeal.

Defendant Fitzpatrick, along with Gary Radi, Travis Holliday, and Paul Bad Horse, were charged with robbery, aggravated kidnapping, and deliberate homicide. The victim was Monte Dyckman, and the crimes were committed on April 5, 1975. Defendants Fitzpatrick and Radi were convicted on all three counts. Defendants Holliday and Bad Horse were convicted of robbery only. Sentencing of defendants Fitzpatrick and Radi for the crimes of aggravated kidnapping and deliberate homicide, raised the specter of the death penalty.

By the time of the sentencing hearing, the United States Supreme Court had already ruled that the death penalty was not per se unconstitutional. But there was great confusion to what kind of death penalty statutes would meet the approval of the Supreme Court. One extreme, and apparently the one taken by the legislature which had passed the death penalty laws involved in this case at the first sentencing, was that only a mandatory death penalty scheme would pass constitutional muster. The belief apparently was that only then could a statute eliminate the doubt attendant upon the surrounding of exercise of discretion in the decision of whether or not to impose the death penalty. Obviously, if the death penalty was mandatory, there would be no discretion at all.

It was also the position of the first sentencing judge that only the mandatory death penalty would pass constitutional muster. For this reason, however, a dilemma existed in relation to the deliberate homicide penalty. For some reason, the legislature had overlooked the deliberate homicide statute in changing the statutes, and the death penalty was not mandatory. Section 94-5-105, R.C.M.1947, provided the death penalty for deliberate homicide "unless there are mitigating circumstances." Thus, the qualifying phrase prevented the deliberate homicide penalty from qualifying as a mandatory death penalty statute. On the other hand, the aggravated kidnapping statute, section 94-5-304, R.C.M.1947 explicitly mandated the death penalty if the victim was dead as a result of the kidnapping. This was the statutory picture at the time the penalties were imposed by the first sentencing judge.

Defendants Fitzpatrick and Radi were sentenced on each of the three counts. For robbery, each was sentenced to 100 years in prison (each had been found to be a persistent felony offender); for deliberate homicide (apparently because the sentencing judge thought the statute to be unconstitutional because it was not mandatory) each was sentenced to 100 years in prison; and for aggravated kidnapping, each was given the death penalty. Defendants Holliday and Bad Horse were each sentenced to 40 years in prison for the crime of robbery. All the defendants appealed from the convictions.

In *State v. Fitzpatrick* (1977), Mont. 569 P.2d 383, 34 St.Rep. 736, this Court ruled that it was prejudicial error to try all the defendants jointly under the particular factual circumstances of the case, and we reversed all convictions. We ordered new and separate trials for each of them. We thus did not reach the death penalty arguments raised by Fitzpatrick and Radi in their first appeal simply because our reversal of the convictions did not require us to determine the death penalty issues.

As events would later prove, however, the first sentencing judge did not accurately assess the constitutional picture. In *State v. Coleman* (1978), Mont. 579 P.2d 732, this Court, because the of the United States Supreme Court decision, declared the mandatory death penalty for aggravated kidnapping to be unconstitutional. On the other hand, in *State v. McKenzie* (1976), 171 Mont. 278, 557 P.2d 1023, this Court upheld the constitutionality of the deliberate homicide statute, apparently for the reason that the qualifying words "unless there are mitigating circumstances" saved it from being designated as a mandatory death penalty statute.

Now to the results of the new trials where each of the defendants was tried separately. Two of the defendants were again convicted of robbery and their convictions were affirmed by this Court. *State v. Holliday* (1979), Mont. 598 P.2d 1132, 36 St.Rep. 1535; *State v. Bad Horse* (1980), Mont., 605 P.2d 1113, 37 St.Rep. 45. Defendant Radi was acquitted on all charges. Fitzpatrick was again convicted on all three counts, and again the death penalty became an issue at sentencing.

Fitzpatrick was sentenced to 100 years in prison for robbery because he was found to be a persistent felony offender. But he was ensnared in a double bind in relation to the conviction on the count of aggravated kidnapping and the count of deliberate homicide. At the first sentencing defendant was sentenced to death under the mandatory statutory provision then existing. By the time of the second sentencing however, we had ruled in *State v. Coleman*, supra, that the mandatory death penalty was unconstitutional. The sentencing judge resolved this little problem by retroactively applying the 1977 death penalty statutes to the crimes committed in 1975. In the process of enacting the 1977 death penalty statutes, the legislature had also repealed section 94-5-304, which called for the mandatory death penalty for aggravated kidnapping. Ch. 338, § 16, Laws of Montana (1977).

The sentencing court made this retroactive application of the law ostensibly under the rationale of and authority conferred by the United States Supreme Court in *Dobbert v. Florida* (1977), 432 U.S. 282, 92 S.Ct. 2290, 53 L.Ed.2d 344, which held that retroactive application of death penalty statutes does not violate the ex post facto clause of the United States Constitution if the statutes are

construed as being procedural or "ameliorative" in nature. In a brief filed with the sentencing court, the Attorney General's Office also urged the sentencing court to retroactively apply the 1977 statutes to the crimes committed in 1975. By this decision, the Supreme Court apparently ruled that a defendant has no constitutional argument and cannot thus complain if a court should determine that the statutes were designed for his benefit rather than for his demise, even though he meets his demise by an application of the statutes. Needless to say, the sentencing court was not to be denied; it retroactively applied the 1977 statutes and sentenced the defendant to death for the crime of aggravated kidnapping.

Subsequent to the decision of the sentencing court to retroactively apply the 1977 death penalty statutes, this Court approved of just such a scheme in the second *Coleman* case, *State v. Coleman* (1979), Mont., 605 P.2d 1000, 36 St.Rep. 1134. There, as here, I lodged a whispering in the wind to dissent to this unjust and inhumane interpretation of ex post facto laws.

The second part of the double bind relates to the possible penalty for deliberate homicide. The first sentencing judge had sentenced defendant to 100 years in prison for this crime, and the second sentencing judge had to confront this fact. In order to go beyond what the first sentencing court did, two hurdles had to be crossed. First the sentencing court had to comply with *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656, which sets forth strict standards before a punishment can be increased after a second trial. Second, the sentencing court, in deciding to apply the 1977 death penalty

statutes to the 1975 crimes, had to find a statutory aggravating circumstance existing under section 95-2206.8, R.C.M.1947, now section 46-18-303, M.C.A., before the death penalty could be imposed.

Needless to say, the sentencing court ruled that it had complied with *Pearce* and that a statutory aggravating circumstance existed under section 46-18-303, and thus imposed the death penalty for deliberate homicide. A large portion of my dissent will be devoted to a demonstration that the sentencing court not only failed to comply with the standards imposed by *Pearce*, but worse than this, the sentencing court and the majority opinion here totally nullified the *Pearce* standards. Furthermore, it is equally apparent that the facts of the deliberate homicide do not justify a determination that an aggravating circumstance exists under section 46-18-303, MCA.

SCOPE OF DISSENT:

Defendant's contention that the 1977 death penalty statutes were unconstitutionally applied to the 1975 crimes has, unfortunately, already been decided against him in the second *Coleman* case, supra. I dissented to the majority opinion in this regard and my dissent in *Coleman* shall also constitute my dissent here. 605 P.2d 1000-1059, 36 St.Rep. 1157A-1157QQ.

I raise in this dissent however, an entirely different issue in respect to the sentencing judge's decision to apply the 1977 death penalty statutes to the 1975 crimes. This point was not raised in the second *Coleman* case, and it has not been raised here. I believe if the majority of this

Court is to remain consistent, that the statutory sentencing scheme in effect and approved in *State v. McKenzie* (1976), 171 Mont. 278, 557 P.2d 1023, should also have been applied here. This would, of course, have obviated any need to apply the 1977 death penalty statutes to the 1975 crimes. In short, if the statutory scheme passed constitutional muster in *McKenzie*, there is no reason why it should not have also been applied here. Failure to apply this scheme has prejudiced the rights of Fitzpatrick. I set forth my position in this regard in *part II of this dissent.*

Defendant also contends that the sentencing judge, when he increased the sentence for deliberate homicide from 100 years in prison to the death penalty, failed to comply with the objective standards set forth in *Pearce*, supra. I agree; but more than this, I believe that fundamental due process of law should prohibit an increase of punishment after the second trial to that of death. My position in this regard is set forth in *part III of this dissent.*

The majority has taken the position that the sentencing court complied with all standards as set forth in *Pearce.* In fact, there was absolutely no compliance by the sentencing court with the standards set forth in *Pearce.* Since, however, the majority has totally obliterated the standards set forth in *Pearce*, I must necessarily demonstrate the havoc that has been wreaked by the majority opinion by the failure to apply *Pearce.* This analysis is set forth in *part IV of this dissent.*

The final part of my dissent concerns the failure of this Court to determine whether or not a statutory aggravating circumstance under section 95-2206.8, R.C.M.1947,

now section 46-18-303, MCA, existed for the imposition of the death penalty for the crime of deliberate homicide. It is clear that a statutory aggravating circumstance did not exist, and thus that the death penalty could not be imposed for the crime of deliberate homicide. The majority opinion has totally neglected to discuss this issue, even though one of the duties of mandatory review imposed by section 41-18-310, MCA, requires this Court to determine whether or not there existed a statutory aggravating circumstance. This analysis is set forth in *part V of this dissent.*

II. IT WAS ERROR FOR THE SENTENCING COURT TO APPLY THE 1977 DEATH PENALTY STATUTES TO CRIMES COMMITTED IN 1975.

In 1976, this Court decided the case of *State v. McKenzie* (1976), 171 Mont. 278, 557 P.2d 1023. In that case the Court upheld the constitutionality of the statutory sentencing scheme as against an attack that the sentencing statutes and appellate review statutes were constitutionally deficient. The statutes involved in that case were in existence before the commission of the crimes in March 1975; they were in existence at the time of the first sentencing; at the time of the second sentencing, and, as a matter of fact, they are still in effect today. One may logically ask then, if these statutes passed constitutional muster in *McKenzie,* why then were they not also applied in the second *Coleman* case, supra, and in the present case?

Although the *second McKenzie* case was not decided at the time either Coleman or Fitzpazrick [sic] were sentenced for the second time, nonetheless the majority

opinion again confirm the constitutionality of the statutory sentencing scheme then in existence. *State v. McKenzie* (1978), Mont., 581 P.2d 1205, 35 St.Rep. 759. If statutes already in existence at the time of the crime had passed constitutional muster, and were still in existence at the time of the second sentencing of both Coleman and Fitzpatrick here, what right did the sentencing courts have in choosing instead to use the 1977 statutes and apply them retroactively?

Retroactive application of the 1977 death penalty statutes is important for two reasons in the case of aggravated kidnapping and important for one reason in the case of deliberate homicide. Retroactive application of the 1977 death penalty statutes was the only way Dewey Coleman could be reached to impose the death penalty for aggravated kidnapping; and likewise, the same is true in the case of the death penalty imposed on Fitzpatrick for the crime of aggravated kidnapping.

If the sentencing court applied the sentencing statutes held constitutional in *McKenzie*, it would still have been confronted with section 94-5-304, R.C.M.1947:

> "A court shall impose the sentence of death following conviction of aggravated kidnapping if he finds that the victim is dead as the result of the criminal conduct."

Since the death penalty was mandatory, and since this mandatory death penalty has been declared unconstitutional in the *first Coleman* case, there would have been no legal way to again impose the death penalty. But application of the 1977 death penalty statutes provided an out. In enacting a new scheme of aggravating and mitigating

circumstances, the 1977 legislature also in the same process repealed section 94-5-304. Ch. 338, § 16, Laws of Montana (1977). The repeal of the mandatory death penalty by the 1977 legislature freed the sentencing court to impose the death penalty for aggravated kidnapping by use of the guidelines set forth in the new 1977 death penalty statutes.

In retroactively applying the 1977 death penalty statutes, the sentencing court in the second *Coleman* case, and the sentencing court here, relied on the State's argument that *Dobbert*, supra, permitted the application of the 1977 death penalty statutes to the crimes committed in 1975. But the sentencing court in *Coleman*, and the sentencing court here failed to recognize that this Court in *McKenzie* had already upheld a statutory system and method of imposing the death penalty. Clearly, therefore, there was no need to use the 1977 statutes, if the statutes in effect at the time of the commission of the crimes had already passed constitutional muster in *McKenzie*.

On the other hand, *Dobbert* does not involve a situation where the statutes in effect at the time of the commission of the crime had already passed constitutional muster. It would thus appear obvious that the statutes approved in *McKenzie*, should have been the statutes used in this case at the second sentencing hearing for both *Coleman*, and for *Fitzpatrick*.

The argument can, of course, be made that the sentencing court would have sentenced defendant regardless of whether it used the statutory guidelines approved in

McKenzie, or the 1977 death penalty statutes. If the sentencing court had not relied on the 1977 legislative repeal of the mandatory death penalty for aggravated kidnapping, it could not have imposed the death penalty at all for that crime. Thus being barred for constitutional reasons, it would then have had to rely exclusively on the provisions of the deliberate homicide statute which was saved from constitutional death by the savings clause at the end, "unless there are mitigating circumstances."

The phrase "unless there are mitigating circumstances" did not hamstring a sentencing court in determining what factors it chose to consider as being mitigating circumstances. On the other hand, the mitigating circumstances statute in the 1977 statutes, set forth a list of mitigating circumstances. Section 95-2206.9, R.C.M.1947, now 46-18-304, MCA. Thus the sentencing court was compelled to follow the list when it sentenced defendant, and after it found no mitigating circumstances under the list, it was, of course, under considerable pressure to impose the death penalty.

Furthermore, section 95-2206.10, R.C.M.1947, now 46-18-305, MCA, imposes considerably more pressure to assess the death penalty. It requires the death penalty to be imposed if the sentencing court finds "one or more of the aggravating circumstances and find that there are *no mitigating circumstances sufficiently substantial to call for leniency*." The mitigating circumstances in relation to the deliberate homicide statute, on the other hand, did not require that they be "sufficiently substantial to call for leniency." The only requirement was the presence of

"mitigating circumstances," without regard to how substantial they may have been.

Under these circumstances, I believe that Fitzpatrick was clearly prejudiced by the decision of the sentencing court to use and apply the 1977 death penalty statutes to his case. It is more than a trifle inconsistent for the majority to have upheld the statutory sentencing scheme in *McKenzie* and then not insist that the statutes be applied to this case.

III. A SENTENCING FUNCTION THAT ESPOUSES FUNDAMENTAL FAIRNESS WILL NOT TOLERATE THE ESCALATION IN PUNISHMENT AFTER A SECOND TRIAL TO THAT OF DEATH.

In permitting the sentencing court to escalate the punishment after the second trial to the death penalty, the majority overlooked the fundamental unfairness inherent in such decision. No judicial system espousing principles of due process of law should tolerate a result where the price exacted for the exercise of a constitutional right to a fair trial is death itself.

The general issue of whether the punishment can be increased after a second trial has been extensively litigated. 12 A.L.R.3d 978 (1966). Indeed, it would appear that the results were so diverse in the federal circuits as well as in the state courts, that the United States Supreme Court finally decided the issue in *North Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656. Although the Supreme Court held that the practice does not violate the double jeopardy or equal protection

clauses, it did recognize the potential evils engendered by such a practice and therefore set forth objective standards which the sentencing court must follow in any decision increasing the punishment. Neither *Pearce*, nor its two companion cases also decided at the same time, involved an increase of punishment to that of death.

Conceptually, at least, the issue of increasing the punishment the second time around to that of capital punishment, is no different from that of simply increasing the imprisonment the second time around, or increasing the fine the second time around. That would appear to be the position the United States Supreme Court took in *Pearce*, when it held that increasing a prison sentence was not a violation of the double jeopardy or equal protection clauses. The Court cited *Stroud v. United States* (1919), 157 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 in reaching its decision. In *Stroud*, the Supreme Court rather summarily brushed aside a contention that the double jeopardy provision prevented a defendant from receiving the death penalty after he has secured a reversal of his first conviction which had imposed a life sentence. *Stroud* did not however, decide the due process question. Whether the Supreme Court would today still apply *Stroud* to a situation where the ante has been raised to one of capital punishment, is a question crying for an answer.

Disregarding the unspeakable dilemma of a defendant facing the prospect of a death sentence the second time around as the price of having successfully attacked his first conviction, the underlying rationale supporting an increased sentence is no different in a capital case than

in a noncapital case. In jurisdictions permitting a higher sentence the second time around, at least three reasons have been advanced in support of this position. First, that the defendant in obtaining a new trial after the conviction of a crime assumes the risk of a more severe sentence that was first imposed should he again be reconvicted of that crime. 12 A.L.R.3d at 981. Second, that a defendant who invoked the action of an appellate court in order to reverse a conviction cannot complain on *double jeopardy* grounds that his sentence cannot be increased if he is convicted again after a second trial. 12 A.L.R.3d at 982. The annotation in this regard, cites *Stroud*, supra, as authority for this position. Third, that as long as the defendant is not convicted of a higher degree of crime, the second time around, an increase of *punishment* does not constitute double jeopardy. 12 A.L.R.3d at 982.

Needless to say, there are strong counterarguments. One view reasons that the potential for a higher punishment after a second trial subjects a defendant to an unconscionable burden to pay as the price for having exercised his constitutional right to a fair trial by appealing his first conviction. 12 A.L.R.3d at 985. This position is illustrated by *State v. Wolf* (1966), 46 N.J. 301, 216 A.2d 586; 12 A.L.R.3d 970. *Wolf* involved a potential death penalty should the defendant be convicted at his second trial.

Another view is that an increase in punishment after a second trial does constitute double jeopardy. 12 A.L.R.3d at 984. This view, insofar as the federal constitution is concerned, was effectively nullified by the majority opinion in *Pearce*, supra. Now such a view would hold only if a state court invoked the double jeopardy clause of its own state constitution.

A third approach, and one reached after the decision in *Pearce*, is that taken by the Alaska Supreme Court in *Shagloak v. State* (Alaska 1979), 597 P.2d 142. The Court flatly held that a greater punishment after a second trial violates the due process clause of the Alaska Constitution.

The determination that the courts must not be a party to a process which exacts such a horrible price from a defendant when he exercises his rights by appealing his first conviction, is essentially grounded on due process considerations. As a matter of judicial policy, this position is even more compelling where the greater punishment after the second trial may be the death penalty. Because capital punishment is a price too high to pay for having successfully attacked a first conviction, several state courts have wisely eliminated the possibility that such a horrible dilemma might be a recurring reality.

The case of *People v. Henderson* (1963), 60 Cal.2d 482, 35 Cal.Rptr. 77, 386 P.2d 677, preceded *State v. Wolf*, supra, in holding that a defendant convicted of first degree murder and given a life sentence, could not, upon a second trial be subjected to the death penalty. The California Supreme Court ruled that the double jeopardy provision intervened to prevent the imposition of a death

penalty. In so reasoning, the Court took the liberty of concluding that *Stroud v. United States*, supra, had been vitiated by *Green v. United States*, supra, thus concluding that the price to be paid by Henderson in exercising his right to appeal his conviction was too high if he could be subjected to a death penalty upon a retrial. The Court, however, couched its reasoning more in a due process analysis:

> " . . . A defendant's right to appeal from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by imposing unreasonable conditions on the right to appeal." 35 Cal.Rptr. at 86, 386 P.2d at 686.

In *People v. Ali* (1967), 66 Cal.2d 277, 57 Cal.Rptr. 348, 424 P.2d 932, the California Supreme Court extended the *Henderson* rationale to apply to any increase in sentence after a second trial.

The New Jersey Supreme Court, in *State v. Wolf*, supra, deliberately avoided grounding its decision on the double jeopardy clause of the United States Constitution. Although the court agreed with the rationale in *Henderson*, supra, it was not as certain that the United States Supreme Court would agree that the "grisly choice" faced by such a defendant was sufficiently alarming to cause the Supreme Court to bar the practice of increasing the punishment after the second trial. Instead, the New Jersey Supreme Court declared that fundamental fairness in the administration of the court system would not tolerate such an unjust result:

> "Traditionally appellate courts have exercised a greater degree of caution in dealing with capital cases, and they have shown special concern over procedures which interfere with the right of appeal. In this case the prosecutor's thesis endangers a vital societal principle, that no person shall be deprived of his life or liberty except by a trial free from prejudicial error. Awareness of that principle naturally stimulates judicial reluctance to see the price of an appeal from an erroneous conviction set at the risk of a man's life. Such a price, in our judgment, is a hardship so acute and so shocking that our public policy cannot tolerate it. Consequently, we hold that since the State has granted the universal right of appeal, standards of procedural fairness forbid limiting the right by requiring the defendant to barter with his life for the opportunity of exercising it." 216 A.2d at 590.

The State argued in *Wolf* that the threat of a death penalty to a defendant should he successfully attack his first conviction, fosters a beneficial institutional interest of the courts by deterring the number of appeals. To this the New Jersey Supreme Court responded:

> " . . . In a choice between forcing the defendant either to surrender his right to an error-free trial as well as his right of appeal, and to accept the life imprisonment sentence, or to put his life at stake again on retrial following a successful appeal, justice can follow only one course. That course is the one demanded by procedural fairness and principles of public policy, namely, prohibition of such a fearsome election, and the restriction of available punishment at a new trial to life imprisonment, if a second conviction results. (Citing cases.) Otherwise, a defendant with perfect grounds of appeal may be deterred from seeking appellate review just the same as one whose appeal rests entirely on frivolous grounds." 216 A.2d at 591.

Although the New Jersey Supreme Court deliberately avoided a direct due process ruling, the essence of its decision rests upon fundamental fairness, the essential ingredient of due process of law.

These same policy considerations expressed in *Wolf*, are expressed in decisions of the Oregon, Minnesota and Alaska Supreme Courts.

The Oregon Supreme Court exhaustively discussed the pros and cons of the cases addressing the issue of increasing the penalty after a second trial, and then concluded that the risk of increased punishment is a price that should not be exacted by the judicial system. *State v. Turner* (1967), 247 Or. 301, 429 P.2d 565. On the basis of public policy the Court adopted the following rule:

> "We believe that the interest of the public and the individual can best be served by the following rule: After an appeal or post-conviction proceeding has resulted in the ordering of a retrial for errors other than an erroneous sentence, such as in the Froembling cases, and the defendant has again been convicted, no harsher sentence can be given than that initially imposed. If the initial sentence was incarceration, the defendant subsequently cannot be sentenced to any longer term than the time still to be served upon his initial sentence." 429 P.2d at 570-571.

The Oregon Supreme Court, however, following the lead of the New Jersey Supreme Court, expressly declined to decide the case on a constitutional ground. The Court quoted extensively from *Wolf*, supra, and then stated the ground upon which it rested its decision:

> "There also remains the issue of whether the rule proposed should be grounded upon the due process or double jeopardy provisions of the state or federal

> constitutions or whether it should be grounded upon the statutes or the common law." "We do not find it necessary to decide the constitutional issues as we conclude that when the state grants a criminal appeal as a matter of right to one convicted of a crime, as it has, our procedural policy should be not to limit that right by requiring the defendant to risk a more severe sentence in order to exercise that right of appeal. ORS 138.020." 429 P.2d 571.

The Minnesota Supreme Court, in *State v. Holmes* (1968), 281 Minn. 294, 161 N.W.2d 650, also examined the cases pro and con and recognized that the federal and state courts were hopelessly divided. The Court ruled, however, that it is contrary to public policy to permit increased punishment after a second trial, for it discourages a defendant from exercising his legal rights. The court held:

> " . . . The third approach, and the one which we adopt, precludes inquiry into the motives of the sentencing judge and holds as a matter of law that any increase in penalty upon a retrial inevitably discourages a convicted defendant from exercising his legal rights and is contrary to public policy. Except for convictions resulting from Federal offenses, the Federal courts have been obliged to base their decisions on constitutional grounds, which we find unnecessary to do." 161 N.W.2d at 653.

The Alaska Supreme Court, by invoking its own due process clause, flatly rejected the rule set forth in *Pearce*, supra. *Shagloak v. State* (Alaska 1979), 597 P.2d 142. In holding that a greater punishment after a second trial violates the due process clause of the Alaska Constitution, the Court stated:

> "We believe if a more severe sentence may be imposed after retrial for any reason, there will always

> be a definite apprehension on the part of the accused that a heavier sentence may be imposed. Such apprehension or fear would place the defendant in an 'incredible dilemma' in considering whether to appeal the conviction. A 'desparate' choice exists, and may very well deter a defendant from exercising the right to assert his innocence and request a retrial. Such deterrence violates the due process clause of the Alaska Constitution. The fundamental standard of procedural fairness, which is the basic due process right claimed in this case, forbids placing a limitation on the defendant's right to a fair trial by requiring a defendant to barter with freedom for the opportunity of exercising it. See *State v. Wolf*, 46 N.J. 301, 216 A.2d 586, 590-591, 12 A.L.R.3d 970, 976 (1966). The state has no valid interest in imposing unreasonable conditions on Shagloak's legitimate exercise of his due process right. The imposition of the five-year sentence after his trial following the change of plea from guilty to not guilty was a denial of due process of law under the Alaska Constitution and cannot be countenanced by this court." 597 P.2d at 145.

Beyond these compelling policy considerations in favor of adopting a strict rule prohibiting an increase in punishment after a second trial under any circumstances, the question arises as to whether the judicial system is capable of effectively reviewing an increased sentence imposed after a second trial. The standards set forth by the United States Supreme Court in *Pearce*, supra, no doubt were designed with this problem in mind. But notwithstanding these standards, the fact remains that vindictiveness of a sentencing judge is something that can rarely be demonstrated by the cold record.

A sentencing judge will certainly not admit to a character trait of vindictiveness. Furthermore, a truly vindictive judge will be careful enough to leave no tracks in

the sentencing record as to the true basis of his decision. Only in the most flagrant cases can vindictiveness be demonstrated by the cold record. Thus, as a practical matter it becomes almost impossible from the cold sentencing record to isolate and identify vindictiveness as the impelling motive. The record of review consists of only what the sentencing court wants to supply for public consumption and the review of the appellate court.

The inherent defects of this situation are not cured at all by the performance of lawyers in presenting a case for review, or by a review court in reviewing the case. As a general rule, lawyers are most unwilling to venture into a judicial political thicket with any kind of zeal, regardless of the merits of the case. Nor are appellate judges willing to undertake the kind of review that is needed. Indeed, an appellate court has a distinct reluctance to categorize the decision of the sentencing judge as vindictive, even though the appellation may be abundantly deserved.

Place all these factors into the same judicial pot and it is immediately apparent that effective appellate review is institutionally impossible. There is, in this process, an institutional bias or prejudice which cannot effectively handle a fundamental problem such as this. The judiciary is, of course, not the only institution which can be accused of this interest in self preservation. At least in the limited context of sentencing, the courts can recognize this inherent institutional bias and the debilitating effect that it has on the administration of justice. Having recognized it, an appellate court can eliminate it by simply not permitting an increase of punishment after a second trial. Only in this way can the institutional bias of the judiciary be effectively neutralized.

The United States Supreme Court has, of course, always taken a special interest in constitutional issues which would have a chilling effect on one's assertion of a constitutional right. There is ample authority from cases decided by the Supreme Court which indicate that it would look upon with a dim view the chilling effect that the appellate process may pose to one who has had the death penalty imposed as a result of having successfully appealed his first conviction.

In *Green v. United States* (1957), 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199, defendant Green was charged with first degree murder and was convicted of second degree murder. A state court reversed the conviction, and upon retrial, Green was convicted of first degree murder. In reversing the conviction, the United States Supreme Court grounded its decision on the double jeopardy clause, holding that at the first trial the conviction of second degree murder carried therein an implied acquittal of the higher charge of first degree murder. By itself, the holding may not stand for too much in the context of Fitzpatrick here facing the death penalty the second time around. But the court, in deciding the case, also rejected the government's argument that a defendant, by appealing a conviction, must be willing to take a gamble that he may be convicted of a greater crime the second time around:

> " . . . the Government contends that [defendant] must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its

> first opinion in this case, a defendant faced with such a 'choice' takes a 'desparate change' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." 355 U.S. at 193, 78 S.Ct. at 226, 2 L.Ed.2d 207; 61 A.L.R.2d 1127.

Without question, the court concluded that the prospect of a death penalty is too high a price to pay for the assertion of a constitutional right.

In a different context, but with the same policy consideration involved, the court decided *Fay v. Noia* (1963), 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837. There, in opposing the defendant's petition for a writ of habeas corpus on the grounds that he had a chance to appeal many years ago and did not do so, the government contended that the defendant had waived his right to invoke habeas corpus. To this, the Supreme Court answered:

> " . . . For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. . . . He declined to play Russian roulette in this fashion . . . " 372 U.S. at 439-40, 83 S.Ct. at 849.

Admittedly, the issue of whether the death penalty could be constitutionally imposed after a second trial and conviction, was not directly before the Court. But the specter of such a result is such that even the possibility is anathema to our system of justice. This is the essence of *Fay*.

This same policy consideration was expressed in *Jackson v. United States* (1968), 390 U.S. 570, 88 S.Ct. 1209, 20

L.Ed.2d 138. There, the defendant challenged a provision of the Federal Kidnapping Act, which provided for the death penalty only "if the verdict of the jury shall so recommend." The Court ruled that such provision "needlessly encourages" waivers of jury trials or guilty pleas to avoid the possibility of the death penalty. One could assert his constitutional right of jury trial only at the risk of the death penalty. This, the Court ruled, is an intolerable burden on the exercise of a constitutional right. 390 U.S. at 585, 88 S.Ct. at 1218.

The possibility of a death penalty being the price one must pay for securing a reversal of a conviction and a second trial is, under any system of justice having fundamental fairness as one of its basic tenets, intolerable. Had the majority considered the implications of its decision and the burden it placed on the availability of the appellate process, I believe that this Court would never have had to decide whether the sentencing court had properly applied *Pearce*.

What happened here, however, is even worse. Not only has the majority failed to acknowledge the fundamental due process issue underlying an increase of punishment to that of death after the second trial, this omission has been compounded by the majority's analysis of *Pearce*. In reaching its decision that the sentencing court lawfully complied with *Pearce* in increasing the punishment to that of death, the majority has totally nullified the *Pearce* standards.

IV. IN IMPOSING THE DEATH PENALTY AFTER THE SECOND TRIAL, THE SENTENCING COURT IGNORED THE STANDARDS SET FORTH IN *PEARCE*; AND IN REVIEWING THE SENTENCE, THIS COURT HAS OBLITERATED THE STANDARDS SET FORTH IN *PEARCE*.

I have already set forth the background of the federal and state decisions which prompted the United States Supreme Court to decide the case of *Pearce*, supra. Since the majority has not done so, it perhaps would be useful to set out the essential facts of *Pearce* and the rules promulgated by the majority decision in *Pearce*.

Pearce was one of three cases decided on essentially the same point. Pearce was convicted of a crime and successfully appealed this conviction to a higher court and was granted a new trial. After his retrial, presided over by a different judge, he was again convicted, but this time he was given a greater punishment than after his first conviction. He contended this greater punishment violated the double jeopardy and due process provisions of the United States Constitution. The Supreme Court disagreed, holding that neither the double jeopardy nor equal protection clauses are violated by imposition of a greater punishment. However, in so holding, the Supreme Court recognized the great potential for evil that inheres in such a process and so adopted specific standards which must be followed before the greater punishment can be upheld. The Supreme Court expressly recognized that without close scrutiny of such cases, the end result is that a defendant is needlessly punished by exercising his right of appeal.

The sentencing court and the majority opinion has patently ignored the requirements of *Pearce*. Furthermore, in seeking to justify its cancellation of the *Pearce* requirements in this State, the majority has patently misinterpreted and misapplied three United States Supreme Court cases decided after *Pearce*. Those cases are *Colten v. Kentucky* (1972), 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584; *Chaffin v. Stynchcombe* (1973), 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714; and *Blackledge v. Perry* (1974), 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628. It apparently is the position of the majority here that these three cases have effectively vitiated the standards set forth in *Pearce* so that it is after only eleven years of existence, no longer the law. To the contrary, *Pearce* is alive and well, but unfortunately, ignored in this State.

It is true, as the majority states, *Pearce* is primarily aimed at detecting vindictiveness in the imposition of a higher punishment after a second trial. Thus the following standards must be used whenever an increased punishment is imposed after a second trial:

> (1) The sentencing court must affirmatively state on the face of the record, its reasons for imposing the higher penalty and set forth the factual data supporting this decision.
>
> (2) The factual data used to justify the higher penalty must consist of specific, identifiable conduct of the defendant occurring after the time of the original sentencing proceedings. 395 U.S. at 725-726, 89 S.Ct. at 2080-2081.

Unfortunately the sentencing court and this Court somehow ignored the application of these standards to this case. The three reasons announced by the sentencing

court and given the green light by this Court for increasing the punishment to death are: (1) that defendant testified at his second trial permitting an assessment of his character; (2) that Christine Fetters gave considerable information relating to defendant's activities in planning the crime and in relation to his conduct after the commission of the crime; and (3) that the constitutionality of the death penalty at the first trial was in doubt, but now all doubts have been resolved. None of these stated reasons comply with the *Pearce* standards.

A. THE DEATH PENALTY JUDGMENT ITSELF ADMITS NONCOMPLIANCE WITH *PEARCE*.

In a footnote at page 9 of the death penalty judgment, the sentencing court admitted its noncompliance with *Pearce* and set forth its reasons for departing from the *Pearce* standards:

> "This increase in sentence from the 100 years previously given *admittedly raises a question for consideration upon review. North Carolina v. Pearce,* 395 U.S. 711, 89 S.Ct. 2072, allows for the imposition of a greater sentence in the light of events subsequent to the first trial that may throw some light upon the defendant *and such information may come to the judge's attention from evidence adduced at the second trial itself,* as well as other sources. At the same time, in requiring that a more severe sentence must be accompanied by a showing of the reasons for the increase in severity, the reasons . . . 'must be based upon the objective information concerning identifiable *conduct* on the part of the defendant occurring *after* the time of the *original* sentence proceeding.' (Emphasis added by District Court.) The question then is whether the judge can act only upon subsequently occurring conduct or whether he can act upon new information

> concerning past conduct which was not known to the judge at the time of the prior sentencing. I have interpreted the *Pearce* decision as being aimed at preventing vindictiveness against a defendant for having successfully attacked his first conviction, and *therefore have concluded that the evidence necessary to justify a more severe sentence can come from new information about the defendant's conduct in the commission of the crime,* i.e. past conduct as well as from new conduct occurring after the original proceeding. *Admittedly, there has been no new conduct relevant to that issue in this case."* (Emphasis added by J. Shea.)

By his own admission, the sentencing judge relied on conduct of the defendant which preceded the first sentencing, but chose to give *Pearce* his own special interpretation in order that he could consider this information. This interpretation flies in the face of the *Pearce* standards.

We thus have a situation where the sentencing court openly admitted that it did not comply with *Pearce* but declared that it really did not matter because it was not vindictive, and that *Pearce* was aimed only at vindictiveness. At least, however, the sentencing court did not attempt to rationalize its decision by asserting that the United State [sic] Supreme Court had later retreated from strict enforcement of the *Pearce* standards. It simply ignored the *Pearce* standards. On the other hand, the majority opinion has misinterpreted and misapplied three post-*Pearce* cases and would have us believe that the United States Supreme Court has already abandoned the standards set forth in *Pearce* in 1969.

Each of the cases cited and quoted by the majority can be understood only in the peculiar circumstances existing in each case. The United States Supreme Court

did not apply the *Pearce* standards in *Colten v. Kentucky*, supra, and in *Chaffin v. Stynchcombe*, supra, because the legal structure existing in the appellate process and later sentencing process satisfied the Court that vindictiveness as a factor in the imposition of a higher sentence, was de minimis. On the other hand, contrary to the implications of the majority opinion, in *Blackledge v. Perry*, supra, the Supreme Court extended the *Pearce* standards by applying them to a prosecutor who was permitted by state law to charge a defendant with a higher degree of crime if the defendant appealed his conviction to a higher court. A brief analysis of each of these cases is in order.

B. THE MAJORITY HAS MISINTERPRETED AND MISAPPLIED THREE DECISIONS OF THE UNITED STATES SUPREME COURT.

In *Colten v. Kentucky*, supra, the situation involved a two-tiered trial system. A defendant convicted at the lower court and sentenced, had an absolute right to appeal to the higher court and have his case tried again. The lower court found defendant guilty and fined him $10; the defendant appealed to the higher court; he was found guilty after a trial de novo, and the fine was increased to $50. He claimed that this was retaliatory sentencing and thus prohibited by *Pearce*. The Supreme Court disagreed, holding that the threat of vindictiveness was de minimis where defendant was entitled to a complete retrial of the facts without reference to what happened at the lower court or to the fact of the appeal itself. Here, it was the system itself upon which the Supreme Court focused, not on whether there was actual vindictiveness demonstrated by the record. Although I agree

with Justice Marshall's dissent, it is at once obvious that *Colten v. Kentucky* has no bearing on the issue before this Court, for the instant case does not involve a two-tiered system involving trial de novo. Nor does this case involve an increase of a fine from $10 to $50.

In *Chaffin v. Stynchcombe*, the jury set the punishment after the first conviction, and a different jury set the second punishment after the second conviction. The jury's involvement in the setting of the higher penalty rendered de minimis the chance that the second jury imposed penalty was the product of vindictiveness. The Supreme Court specifically noted that it was conceded that the second jury did not know the penalty which the first jury had imposed, and that the second jury would "have no personal stake in the prior conviction and no motivation to engage in self-vindication." 412 U.S. at 27, 93 S.Ct. at 1983. This situation contrasts starkly with the instant case. Here the second sentencing judge had specific knowledge that the first judge had given a 100 year sentence rather than impose the death penalty. Furthermore, the second judge here would have no less institutional interest than the first judge, in discouraging or preventing what they considered to be nonmeritorious appeals. A jury, on the other hand, does not have such institutional interest in preserving the system.

Nor can the majority derive any support from *Blackledge v. Perry*. Indeed, the Supreme Court extended the *Pearce* rationale by applying it to a system which permitted the prosecutor to raise the ante if a defendant sought trial de novo in a higher court. Defendant was convicted of a misdemeanor and pursued his absolute statutory right of appeal and trial de novo in a higher court. The

law, however, permitted the prosecutor to obtain an indictment charging a more serious offense, and then to proceed to trial only on the more serious charge. The prosecutor filed a more serious charge against the defendant, and this, the Supreme Court held, violated the *Pearce* standards for it discouraged convicted misdemeanants from pursuing their statutory appellate rights of trial de novo. Concerning this statutory scheme permitting the prosecutor to raise the ante, the Supreme Court stated:

> "A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." 417 U.S. at 28, 94 S.Ct. at 2102-2103.

Thus, it is patently clear that the United States Supreme Court, in determining whether the statutory scheme or the action of the sentencing court would have a tendency to chill the right of appeal by threat of higher punishment the second time around, will focus on the system itself as well as the particular facts. The Court does not require that a defendant demonstrate that the sentencing court acted maliciously or in bad faith.

The chilling effect of the sentencing court raising the ante from 100 years in prison after the first trial to that of death after the second trial, speaks for itself. What is even more chilling is the clear, announced departure from *Pearce* on the part of the sentencing court as well as the decision of this Court in failing to recognize that even token compliance with *Pearce* did not exist in this case.

The rationale of the majority in concluding that somehow *Pearce* does not apply, is patently erroneous. The majority states:

> "Therefore we conclude that *Pearce* does not apply in defendant's case because the District Judge was replaced for the new trial and sentencing and he stated his reasons for imposing the death penalty on these charges with clarity."

The majority erroneously concludes that *Pearce* has no application if a new judge presides over the second trial and resentencing. But such is not the case at all. A reading of *Pearce* does not disclose whether a new sentencing judge presided over any of the three separate cases which were decided, or whether it was the same judge in each instance. But that is not the point of *Pearce* in any event. Indeed a reading of the three *post-Pearce* Supreme Court cases cited and misapplied by the majority, would lead one to believe that a new judge presiding over the second trial and sentencing would require a strict *Pearce* application. Furthermore, each of the three defendants involved in the *Pearce* decision received increased jail or prison sentences. That is a far cry from the defendant here, who was confronted with the horrible dilemma of being faced with a potential death penalty after a second trial.

In *Chaffin v. Stynchcombe*, the Supreme Court referred to the second jury which had set the increased punishment after the second trial, as having "no personal stake in the prior conviction and no motivation to engage in self-vindication." 412 U.S. at 27, 93 S.Ct. at 1983, 36 L.Ed.2d at 724. But the majority here has twisted this statement around to apply to the second sentencing judge whose sentence is now under review here. The United

States Supreme Court was referring to a two-tiered system of trials whereby the jury in the event of conviction, also set the punishments. Indeed, in declaring that the imposition of punishment by the jury insulated the decision from the possible taint that would exist had it been a judge who determined the second punishment, the Supreme Court specifically noted that a jury has no institutional interest in discouraging nonmeritorious appeals but a judge does have such institutional interest. Indeed, under the rationale of *Chaffin*, the fact that a judge here did impose the greater punishment is sufficient to subject the sentencing to the *Pearce* standards.

The second reason why *Pearce* does not apply, according to the majority, is that the sentencing judge "stated his reasons for imposing the death penalty on these charges with clarity." I fail to see how this has anything at all to do with whether or not *Pearce* applies. Assuming that the reasons for increased sentence were stated with particularity, this fact does not eliminate our review functions under *Pearce* to determine if the reasons stated, regardless of how clear, are legally sufficient. Indeed, an examination of the reasons given reveals that both the sentencing court and this Court have vitiated the *Pearce* standards. Since the majority has set forth the reasons why the penalty was increased, but has not stated the underlying evidence in support of the stated reasons, I feel compelled to do so.

C. THE SENTENCING COURT AND THIS COURT HAVE NULLIFIED THE STANDARDS SET FORTH IN *PEARCE*.

As a starter, the sentencing court admitted within the body of the judgment that it had departed from the *Pearce*

standards but in the same breath announced that it was not vindictive and therefore that it still was complying with the spirit of *Pearce* which was aimed at weeding out vindictive increases in punishment.

So that the record is clear, I again set out the majority's statement of the reasons announced by the sentencing judge in justification of his increase in punishment to that of death:

> "(1) The defendant testified at the second trial, allowing for an assessment of his character.
>
> "(2) Christine Fetters, a witness who did not testify at the first trial, yielded considerable information concerning defendant's conduct during the planning and execution of the crime, as well as his actions subsequent to the commission of the crime.
>
> "(3) The constitutionality of the death penalty provision for the crime of deliberate homicide was no longer in doubt as it had been when the first judge imposed the 100 year prison sentence."

The only reason which conceivably could comply with the *Pearce* standards, is the first reason stated, and as I will later discuss, this so-called character assessment during the second trial is fraught with danger.

Each of these stated reasons must be lined up with the requirements set forth in *Pearce* that there be in the record, objective conduct of the defendant occurring after the first sentencing, and a clear statement of the sentencing court of what objective conduct it used as a basis to conclude that an increased punishment was justified. *Pearce* also set forth the possible sources for obtaining this information:

> " . . . events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct and mental and moral propensities.' *Williams v. New York*, 337 U.S. 241, 245, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources." *Pearce*, 395 U.S. at 723, 89 S.Ct. at 2079.

The following is what the sentencing court stated in the record concerning the importance of and its reliance upon the testimony of Christine Fetters:

> " . . . Also, an entirely new witness. Christine Fetters, defendant's girlfriend during the entire time from defendant's release from prison on March 28th, 1975, to his arrest in Spokane, Washington, on June 3rd, 1975, yielded information concerning the conduct of the defendant during the time period when the crimes here involved were planned and executed, as well as during their travelling subsequent to the commission of the crimes.
>
> "This included further and more definite affirmation that it was the defendant, who, yielding *sua sponte* to his lack of regard for human life, fired the fatal shots into Monte Dyckman's head, much to the consternation of the other participants to the crime who were upset at a robbery being escalated into murder.
>
> "Also included are the actions of the defendant in burying the murder weapon used against Dyckman and thereafter arming himself with another handgun and carrying it with him during the course of their constant travelling to 'blow their way out,' or language to that effect, in the event anyone should stop them.
>
> "Further, there is the evidence of subtly phrased language in a letter to Christine Fetters after his

> apprehension, which language could only be interpreted as threats against the lives of her children because of defendant's erroneous assumption that Christine Fetters had been the cause of his arrest." (Sentencing Court's Judgment of Death at 5-6.)

Assuming that the activity itself is sufficient to justify an increase of punishment from 100 years in prison to that of death, it fails nonetheless because the entire activity took place before the first sentencing. *Pearce* requires that it be objective conduct of the defendant that has occurred *after* the first sentencing. 395 U.S. at 726, 89 S.Ct. at 2081. The sentencing court at least acknowledged its failure to comply with *Pearce* in this regard. See Judgment at 9. But the majority opinion has not even mentioned this fatal act of noncompliance.

The second reason advanced for increasing the punishment to death is that at the second sentencing the constitutionality of the death penalty was no longer in doubt, whereas at the first sentencing, doubt did exist and this may well have prompted the first sentencing judge not to impose the death penalty. In relying on these changes in the law, the sentencing court stated:

> "Further, it is apparent from a review of the record of the prior trial that contentions had been asserted that the penalty provision for the crime of deliberate homicide was constitutionally defective and the presiding judge several times suggested that he could avoid that constitutional question simply by not imposing the death penalty in the event of a conviction of such charge, and this feeling obviously attended the judge's considerations even up to the time of actually pronouncing sentence, as is evidence from the copy of that portion of the transcript which is attached hereto as Exhibit 'A' and 'A-1'. Thus, the 100-year sentence was not arrived at because of its

> appropriateness to the characteristics of the defendant, but rather, according to the legal limitations the judge then felt were in force. Changes in the law, nullifying the prior constitutional concerns, have since been accomplished and that fact, coupled with the new and illuminating evidence appearing in the latest trial bearing upon the life, health, habits, conduct and mental and moral propensities of the defendant, do constitute objective information concerning identifiable conduct on the part of the defendant, *and its emergence post-dates the time of the original sentence."* Sentencing Court's Death Judgment at 6-7. (Emphasis added.)

The sentencing court did not specify what changes in the law it had reference to, but I can only conclude that it had reference to the 1977 statutes under which it sentenced the defendant to death, and conceivably, to the *first McKenzie case,* supra, which was decided before the sentencing here and which upheld the then existing statutory sentencing scheme as it had been applied to a death penalty case.

A change in the status of the law cannot under any circumstances be considered as evidence of the defendant's conduct. It is, rather, merely a comment on a sad chapter in the history of death penalty litigation in this State. It is nothing less than astonishing to think that a sentencing court would list subsequent changes in the law as a reason for increasing the punishment to death.

The remaining justification for the increase of punishment to that of death, is that the sentencing court gleaned the necessary information from its observation of the defendant at the second trial, and particularly from its observation of the defendant's testimony while he testified on his own behalf. (Defendant did not testify at

his first trial.) Assuming, however, that character analysis of a defendant's demeanor while testifying constitutes specific and identifiable conduct with the *Pearce* standards, this Court has been provided absolutely no record to review. The sentencing record is devoid of any observations made or of character analysis performed by the sentencing judge.

The sentencing judgment contains two scant references to the fact that the sentencing judge, in reaching its decision to increase the punishment to death, considered defendant's demeanor and testimony at his second trial. The judgment does not tell us what observations were made or conclusions reached.

In the preamble portion of the judgment there is a brief reference to the sentencing court having considered defendant's demeanor and testimony at the second trial:

> " . . . and after observing the defendant's demeanor during the trial and while testifying on his own behalf, the Court now makes the following findings, conclusions, judgment and order:" Sentencing Court's Judgment at 2.

In one portion of the findings there is another brief reference to the fact that the trial court considered defendant's demeanor as a factor in his decision to increase the punishment to the death penalty:

> " . . . Specifically, the defendant testified at his own behalf during the present trial, allowing for an assessment of the defendant in all ways that viewing demeanor and the manner and content of testimony can be productive of insight into the character of a witness." Sentencing Court's Judgment at 6.

The foregoing is the sum and substance of the character analysis performed by the sentencing court upon the demeanor and testimony of the defendant at his second trial.

What was so obnoxious or reprehensible about the defendant's conduct at his second trial, or his testimony at his second trial, that the sentencing court, in its omniscience, could determine that the defendant must die? The court may indeed have been possessed of the wisdom of Solomon in making its decision, but if it was so possessed, it did not provide this Court with the benefit of such wisdom by which we can conclude that the requirements of *Pearce* had been satisfied.

Notwithstanding the failure to set forth the character analysis for the record, character analysis is by its very nature subjective, and thus cannot comply with the objective standards of *Pearce*. Not every trial judge would view the defendant's conduct at the second trial in the same way, and not every trial judge would view the defendant's testimony in the same way. *Pearce* requires, on the other hand, that the conduct of the defendant be specific and identifiable.

The subjective nature of character or demeanor analysis prevents effective appellate review. The proceedings here were not videotaped, nor even voice recorded. All we have before us is the cold record of the trial and the cold record of the sentencing hearing. These records are a totally inadequate basis upon which the Court can begin to review a character analysis. Indeed not even videotapes or voice recordings would aid us in this task because the review process itself, by the nature of the

subject matter, would be a subjective process. It is highly unlikely that each member of this Court would make the same observations of the defendant as did the sentencing court, and it is equally as unlikely that each member of this Court would make the same analysis as did the sentencing court. Review under such circumstances is meaningless.

Use of character analysis such as used here, will, moreover, have an absolutely chilling effect on the choice of a defendant to take the witness stand at his second trial. If a defendant knew that his mere presence at the second trial, or his testimony at the second trial, would constitute an evidentiary basis under *Pearce* to permit an increase of the punishment to death, the chances are that he would not testify at all. He would be afraid to testify in his own case for fear that the sentencing court would use his testimony as the so-called objective conduct upon which a death sentence could be predicated. This is the kind of "grisly" choice that the United States Supreme Court has condemned. *United States v. Green*, supra; *Fay v. Noia*, supra, *United States v. Jackson*, supra.

V. SENTENCE REVIEW: A STATUTORY AGGRAVATING CIRCUMSTANCE CANNOT BE APPLIED TO THE DELIBERATE HOMICIDE COMMITTED IN THIS CASE.

The majority here has totally missed the main point of sentence review as it applies to this case. It is a rather simple matter to analyze a few cases involving the death penalty and conclude that they are of no help to the defendant. Section 46-18-310, MCA sets forth the duties of this Court in regard to sentence review:

"The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

"(1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

"(2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 46-18-303 and 46-18-304; and

"(3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration."

It is clear to me that the death penalty for deliberate homicide was imposed notwithstanding the clear failure to establish an evidentiary basis for the existence of a statutory aggravating circumstance. This being so, I conclude that the sentence imposed violated sections 46-18-310(1) and (2), MCA.

All of the aggravating circumstances for either homicide or kidnapping, are set forth in section 95-2206.8, R.C.M.1947, now section 46-18-303, MCA, which provides:

"Aggravating circumstances. Aggravating circumstances are any of the following:

"(1) The offense was deliberate homicide and was committed by a person serving a sentence of imprisonment in the state prison.

"(2) The offense was deliberate homicide and was committed by a defendant who had been previously convicted of another deliberate homicide.

"(3) The offense was deliberate homicide and was committed by means of torture.

"(4) *The offense was deliberate homicide and was committed by a person lying in wait or ambush.*

"(5) The offense was deliberate homicide and was committed as a part of a scheme or operation, which, if completed, would result in the death of more than one person.

"(6) The offense was deliberate homicide as defined in subsection (1)(a) of 45-5-102, and the victim was a peace officer killed while performing his duty.

"(7) The offense was aggravated kidnapping which resulted in the death of the victim." (Emphasis added.)

Section 95-2206.10, R.C.M.1947, now section 46-18-305, MCA, provides, inter alia, that before the death penalty can be imposed, at least one or more of the statutory aggravating circumstances must be found to exist. Thus, before the sentencing court could impose the death penalty for deliberate homicide, it was required to find at least one statutory aggravating circumstance. It found the aggravating circumstance to exist under subsection (4) which provides "the offense was deliberate homicide and was *committed by a person lying in wait or ambush.*" (Emphasis added.)

The vital question is, of course, whether defendant committed the homicide while "lying in wait or ambush." The sentencing court found that he did; but its own findings belie this conclusion. An analysis of the evidence and of the sentencing court's findings clearly establishes that defendant was not lying in wait or ambush at the time he killed Monte Dyckman. Indeed, the finding that defendant was lying in wait or ambush does not relate at

all to the actual homicide. Rather, the finding describes defendant as "lying in wait or ambush" at the bank, waiting for the person to arrive from the Safeway Store with the receipts from the day's business.

Following are the findings set forth in the judgment with regard to the statutory phrase " . . . lying in wait or ambush":

> "That on the 5th day of April, 1975, being only eight days after his release from the Montana State Prison, *the defendant was lying in wait or ambush* at the Big Horn Drive-in Bank of Hardin, Montana, for the arrival of an employee of the Hardin Safeway Store carrying the store receipts for deposit in the bank. The courier on that night was a young man, Monte Dyckman, who occupied the position of assistant manager at Safeway. Upon his arrival at the drive-in bank, Dyckman was robbed by the defendant and then abducted in his own automobile, his hands being bound behind his back and he was taken by the defendant to the Toluca Interchange approximately 12 miles west of Hardin where, in a secluded spot behind a pile of gravel, the defendant shot him twice in the head with a .45 caliber semi-automatic pistol, causing instantaneous death. That such death was the proximate result of robbery plans initiated several days earlier. . . ." Judgment at 2. (Emphasis added by sentencing court.)

Having thus found that defendant was "lying in wait or ambush" at the bank while waiting for the person to show up with the day's receipts from the Safeway Store, the court then determined that this fit within the meaning of the aggravating circumstance for deliberate homicide, that is, that the homicide was "committed by a person lying in wait or ambush." There is nothing from the factual recitation in the judgment however, from which

one can even conclude that the intent of defendant to kill Monte Dyckman preexisted or arose while he was waiting at the bank. Indeed, the remaining findings of the sentencing court clearly establish that defendant's decision to kill Monte Dyckman was a spur of the moment decision which occurred some time later and several miles away from the bank.

In reciting what information he had obtained at the second trial concerning the circumstances of the commission of the crimes, the sentencing court offered the following analysis or findings:

> " . . . Also, an entirely new witness, Christine Fetters, defendant's girlfriend during the entire time from defendant's release from prison on March 28th, 1975, to his arrest in Spokane, Washington, on June 3rd, 1975, yielded information concerning the conduct of the defendant during the time period when the crimes here involved were planned and executed, as well as during their travelling subsequent to the commission of the crimes. This included further and more definite affirmation that it was the defendant, who, yielding *sua sponte* to his lack of disregard for human life, fired the fatal shots into Monte Dyckman's head, much to the consternation of the other participants to the crime who were upset at the robbery being escalated into murder." Judgment at 6-7. (Emphasis by sentencing court.)

Thus the sentencing court's own findings clearly foreclose any determination that the deliberate homicide was committed while "lying in wait or ambush." The court found that the defendant's decision to kill Monte Dyckman was a *"sua sponte"* decision, and that all those involved believed that robbery was the only objective.

The obvious gravamen of subjection [sic] (4) is that the legislature considers a homicide to be more serious if the perpetrator was "lying in wait or ambush" at the time the deadly act was unleashed against the victim. But here, however despicable the crime committed, it does not fail within the statutory aggravating circumstances of subsection (4). The defendant was not lying in wait or ambush for Monte Dyckman when he killed him.

It has always been my understanding that penal laws are to be strictly construed against the State. There is no more compelling reason to do so than where the death penalty is the potential punishment. But rather than strictly construing these laws against the State, the majority here has liberally construed them in favor of the State in order to justify the imposition of the death penalty.

Defense counsel did not raise the issue of the nonexistence of a statutory aggravating circumstance which thus prevents the imposition of the death penalty. Why he did not do so I do not know. But regardless of whether he raised the issue, this Court has the clear duty under section 46-18-310(2), supra, to determine "the existence or nonexistence of the aggravating . . . circumstances" enumerated in the statute. Furthermore, even without this statute, we owe this duty to any defendant who has been sentenced to death.

This duty of review exists regardless of whether defense counsel has done so. Furthermore, especially in a death penalty case, it is the duty of the State, and particularly the Attorney General's Office, to carefully review the record to determine whether there has been compliance with the statutes. If there has not been compliance, it

is the duty of the State to so inform this Court. Obviously, the State here either failed to adequately review the record, or, if it did so, and found the defect, the State has deviated from the standards of ethical practice by not bringing this fact to the Court's attention.

We have here a situation where the sentencing court retroactively applied the 1977 death penalty statutes, and by so doing, it was able to sentence defendant to death for the crime of aggravated kidnapping. It used the same statutes, moreover, in sentencing defendant to death for the crime of deliberate homicide. Although the majority has approved of this retroactive application, it is nonetheless clear that the sentencing court was not and could not be fair to defendant at the sentencing hearing and in the process of reaching its decision to impose the death penalty for both convictions.

When the sentencing court sentenced defendant to death for the crime of deliberate homicide, there can be no doubt that it violated *North Carolina v. Pearce* standards set forth by the United States Supreme Court. Indeed, the sentencing court admitted that it did not comply with the mandates of *Pearce*, but it sought in its decision to justify the noncompliance by its wholly subjective determination that it was not vindictive and thus that it complied at least with the spirit of *Pearce*. Furthermore, there can be no doubt that a statutory aggravating circumstance did not exist as a necessary prerequisite to permit the imposition of the death penalty for the crime of deliberate homicide. Indeed, the twisted and tortured application of the aggravating circumstances statute to the facts of the deliberate homicide here, is clear evidence of the bias with which the sentencing court approached

its duties of presiding over the sentencing hearing and reaching a sentencing decision. By ignoring the mandates of *Pearce*, and by ignoring the facts in applying the statutory aggravating circumstance statute, the sentencing court not only poisoned the deliberate homicide death sentence, it poisoned its entire decision. It is difficult to rationalize and uphold a death penalty for aggravated kidnapping, where, in the same process, the sentencing court was so blatantly in error in reaching its decision to impose the death penalty for deliberate homicide.

Regardless of whether the death penalty may be a permissible form of punishment, a fair interpretation of those laws does not give this Court or any court the license to so loosely interpret them to the extent that a sentencing court can interpret them with virtual impunity. Perhaps this is one of the real dangers of the death penalty hysteria; the courts too, are swept along in the process.

For all of the foregoing reasons, I would set aside the death penalties imposed and remand for resentencing with instructions that the death penalty is not to be considered in this case.

APPENDIX E

(p. 320) THE COURT: Why don't we do that. You can get your exhibits marked and so forth.

MR. FORD: Thank you, Your Honor.

THE COURT: Let me know.

(Short recess taken.)

THE COURT: Court will be in session.

Mr. Ford.

MR. FORD: Mr. Adams is here now, Your Honor, and we'll call him.

THE COURT: All right.

JOHN LEE ADAMS, JR., ESQ.

called as a witness by and on behalf of the petitioner, being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. FORD:

Q. Did you get your name on the record, Mr. Adams?

A. John Lee Adams, Jr.

Q. You live here in Billings?

A. I live at 2215 Dahlia Lane, Billings, Montana, Zip Code 59102.

Q. How are you employed, Mr. Adams?

A. I am an attorney in private practice, also work as a public defender, maintain an office at 222 Hedden-Empire Building, 208 North 29th Street, Billings, Montana, (p. 321) Zip Code 59101.

Q. How long have you been an attorney?

A. I was licensed to practice in March of 1954.

Q. And how long have you been a public defender?

A. I've been a public defender since January of 1970.

Q. Were you involved in a professional capacity in any of the cases arising out of the Monte Dyckman homicide in 1975?

A. I represented Paul Bad Horse in the first trial that was had, held in this courthouse, in 1975 or '76 – I've forgotten the exact year – and I also represented Bernard Fitzpatrick on retrial.

Q. Now with regard to your representation of Mr. Bad Horse: that was the first trial of this case where there were four defendants tried jointly, is that correct?

A. That is correct.

Q. And what sort of work did you do in preparing for Mr. Bad Horse's defense?

A. There were four attorneys in that case. Mr. Robert Stephens represented Mr. Radi, Mr. Chris Nelson represented Mr. Bernard Fitzpatrick, Mr. James Reno represented Mr. – Forgot the other defendant's name and I know it well.

THE COURT: Travis Holliday?

A. – Travis Holliday, and I represented Paul Bad Horse. The four of us worked in conjunction with preparation of the (p. 322) case, instructions, strategy, et cetera.

Q. Did you personally or did an investigator working for you do any witness interviews with regard to Mr. Bad Horse's defense?

A. As I recall, we ourselves did most of our own investigating work in regards to that case. I don't remember whether we had an investigator or not.

Q. Do you recall interviewing any witnesses for Paul Bad Horse's defense?

A. I interviewed some, not very many.

Q. Can you describe what the nature of Paul Bad Horse's defense was?

A. It's – 1975. Paul Bad Horse, I saw him first at the county jail in Hardin, Montana. I also saw Mr. Bushman there in Hardin, Montana, and talked with Mr. Bushman and Mr. Bad Horse. Following this it was decided that Mr. Bad Horse's defense would be principally that he was elsewhere in the city of Hardin and he had not actively participated in the crime, knew nothing about it and it would be encumbent upon the state to prove it.

MR. MAYNARD: Your Honor, before we go any further I think there should be some mention made of Mr. Adams and Mr. Bad Horse's relationship and privilege and what the status is of that privilege at this point in time before Mr. Ford pursues this line of questioning much further.

(p. 323) THE WITNESS: I will not go into what Mr. Bad Horse told me or didn't tell me; I'm only informing him whom I talked to.

MR. MAYNARD: Thank you.

THE COURT: All right, you may proceed.

Q. Did Mr. Bad Horse's defense have anything to do with witnesses relating to the presence of individuals in Billings, Montana, on that night?

A. Apparently you're not aware of the fact that we put on no defense for any of the parties in regards to that case following the close of the state's case –

Q. Well, I'm asking –

A. – for the reason that there was no need to.

Q. I'm asking whether or not in terms of preparing there was any need to talk to witnesses –

A. My preparations at that time are forgotten because of the fact that we put on no defense. I have only knowledge of what we did as a consequence of strategy in the case.

Q. Did you, preparatory to either the Bad Horse case or the Fitzpatrick case, have access to various witness statements that had been taken from different witnesses?

A. Full disclosure was made in respect to the case at all times by the county attorney in regard both to Bad Horse and Mr. Fitzpatrick.

(p. 324) Q. Showing you what's been marked as Defendant's Exhibit AE, do you recognize what that is?

A. That appears to be a statement from Iva Lee Finch given to a Mr. George Cunningham working for the sheriff's office in Hardin, Montana.

Q. Do you recognize whether you have previously seen that document?

A. If it was in the case file I undoubtedly saw it. I do not recall specifically having seen it at this time and place. There was a great deal of material in that file, sir, and I doubt very much whether you can remember what is on Page 2 and you've read it very carefully, when they asked Mr. Richter – Mr. Richter makes a statement. Now in respect to it, this statement, if it was in the file it was shown me, and I can't recall specifically what was or was not in that file, sir.

Q. Thank you.

MR. FORD: Move to admit AE.

MR. MAYNARD: Your Honor, we'd object to the admission of this statement on the basis of relevancy. I don't think it's been shown to be relevant yet, nor has a proper foundation been laid. Mr. Adams doesn't recall specifically having seen the statement before. And it's also hearsay.

THE COURT: The objection will be overruled. What (p. 325) is it, AE or E?

MR. FORD: AE, Your Honor.

THE COURT: May I see it for a moment.

MR. FORD: Yes.

(Exhibit handed to the Court by Mr. Ford.)

Q. Do you recall the general nature of Iva Lee Finch's testimony at either of the two trials?

A. I do.

Q. And can you briefly recall what that was?

A. Sketchily outlining it: I believe Finch indicated that Travis Holliday had taken her and another young lady – if I recall correctly, they were both underage – and that they accompanied Mr. Holliday and Mr. Paul Bad Horse and Mr. Bushman in a vehicle to Hardin, Montana, where they were to engage in solicitation for purposes of prostitution of citizens of the city of Hardin. Their testimony was that they remained there and during the course of leaving that Mr. Fitzpatrick and Mr. Radi were in another vehicle and passed them as they were traveling to Hardin, Montana. That in substance, is the gist of the conversation that was pertinent.

Q. Do you recall whether Miss Finch testified as to how she left Hardin, Montana, that night?

A. I don't recall her method of return to Billings specifically. Trying to refresh my memory right now. As I (p. 326) remember, she came back to Billings, I believe it was with Travis Holliday and Mr. Bushman and Mr. Bad Horse. I believe she returned the same way that she came but I can't be specific because it's been quite a while ago.

Q. Calling your attention to Page 22 of this statement that's been marked Defendant's Exhibit AE and beginning at Line 7, can you read that page and the next page from there, see if it refreshes your recollection as to any of her statement.

A. "Q. Now you leave for Billings again 11:30 or midnight, right?

"A. Yeah. No, it was about 12:30. We left that man's house at 11:30 or 12:00 o'clock.

"Q. You left Hardin about 12:30 then?

"A. Yes.

"Q. And went back to Billings?

"A. Yes.

"Q. Did you ask where the other two, Gary and Fitz, were at when you got in that car?

"A. No."

Now, they were not in the car when they had gone to Hardin. They went to Hardin in a separate vehicle, according to her original statement.

"Q. Was there any conversation after you left Hardin going to Billings about anything?

(p. 327) "A. Yes.

"Q. What was that?

"A. Travis told that one guy, that I don't know his name, that he wanted his gun, and Travis said something about, 'You shouldn't have did something,' 'You shouldn't have,' – I don't know, it was referring to like, you should a hurt him or something. It was something –

"Q. Hurt who?

"A. They never said."

Now, at that time there was no knowledge, no knowledge whatsoever, that any person was dead or was deceased. That knowledge came afterwards when they arrived in Billings, Montana, at the home of Mr. Radi when Mr. Radi made disclosure or alleged disclosure to Mr. Bushman and allegedly in the presence of Paul Bad Horse.

Q. Mr. Adams, just so the record will remain clear –

A. I'm answering the questions as I go through to tell you that this does refresh my memory.

Q. In answering the questions, though, and in having your memory refreshed, could you, for the court reporter, please distinguish between the parts you're reading and where you are not.

A. "Q. Was you under the impression somebody was hurt or something got out of hand?

"A. Well, I thought maybe that Indian guy.

(p. 328) "Q. Which Indian?

"A. Small Change might have got in a fight with one of those guys like Gary or one of those, because, you know, I thought to myself, well you know that was probably why we never saw them, you know.

"Q. But you didn't know what they were referring to when Travis told Small Change that he shouldn't have done what he did, or hurt this other person?

"A. Yes.

"Q. What was Small Change's answer?

"A. He said, 'Oh well, I had to do it.'

"Q. Did he say why he had to do it?

"A. No.

"Q. Were they serious or did he laugh?

"A. Yes, he laughed, they were laughing.

"Q. Both of them were laughing?

"A. Yeah. Well, all of them were laughing.

"Q. Who do you mean by all of them?

"A. The two Indians and that lady, they were all laughing.

"Q. Now, was there anything mentioned on the way back to Billings, anything else mentioned about money, guns?

"A. Yeah. He told that Indian that he wanted his gun back.

(p. 329) "Q. Who is 'he'?

"A. Travis.

"Q. Told Small Change?

"A. No, the other one, the other Indian."

Is that sufficient?

Q. Who is Small Change?

A. Small Change was a nickname for Paul Bad Horse.

Q. Do you recall whether this statement of Iva Lee Finch was available for you in the Fitzpatrick trial in 1978?

A. I do not recall.

Q. Would you have felt free at that time, given your previous relationship with Paul Bad Horse, to have explored a defense which would have implicated him as the guilty party in the Monte Dyckman homicide?

A. That opportunity was afforded the state and I'm sure they did not try to conceal any evidence and I would not have explored it for the reason it would have been a lie.

Q. Would you have felt free had you not believed it to be a lie, given your previous relationship with Mr. Bad Horse, to have explored it?

A. Yes.

Q. Did you explore it?

A. No. For the reasons that I gave.

May I speak further?

(p. 330) Q. Yes.

A. Paul Bad Horse at all times was in downtown Hardin. So, also, was the girls. Now, they visited various and sundry bars there in Hardin, Montana, during the time that the alleged robbery was occurring, making known their presence. Paul Bad Horse may have had an altercation. He was pugilistic at one of those bars and that may have been what Mr. Travis Holliday was referring to.

Q. Again calling you attention to Pages –

A. There is nothing that indicates that that has reference to the crime or the alleged crime. You're inferring that it does. If you can show me where it does, I will tell you why I did not.

Q. Calling your attention to Pages 24 and 25, is there further discussion related in there between Mr. Bad Horse, called Small Change, and Mr. Holliday regarding giving a gun back?

A. There is.

Q. And does it relate a statement from Mr. Bad Horse with regard to that?

A. Mr. Bad Horse, that is, Small Change, says, "Well, you shouldn't be an Indian giver" or "You can't be an Indian giver," something to that effect.

Q. May I see it?

A. That's on Page 25, Lines 6 through Lines 9.

(p. 331) Q. And then once again she reiterates that Mr. Holliday says, "You shouldn't have done that," and Small Change said, "Well, I had to," is that correct?

A. Mm-hmm. What do they have reference to?

Q. Well, obviously only the individuals involved would have known that.

Would you not have felt that this testimony would have been extremely damaging to Mr. Bad Horse in this trial?

A. In his trial it would have been damaging; in this trial it would not have been damaging. He had been tried

and his case was settled, insofar as the murder charges are concerned. They could not be retried on those charges.

Q. And you were convinced in your own mind, based on your previous defense of Mr. Bad Horse, that he had not been involved in the homicide directly, is that correct?

A. I was convinced that he had been downtown in downtown Hardin during the crime. And I may advise you that that particular statement, as you state, you infer that it relates to the deceased and the death of the deceased. It does not necessarily relate to that. Mr. Bad Horse himself is somewhat pugnatious.

Q. Well, Mr. Adams, in fairness, given your experience –

A. This would have been misleading to have introduced this and tried to deceive a jury by inferring what you're (p. 332) trying to infer.

Q. You've been a prosecutor as well, is that right?

A. I was 14 years a prosecutor.

Q. If you were prosecuting Mr. Bad Horse, would you consider that to be relevant evidence?

A. In his case I possibly would have introduced it, to show that Mr. Bad Horse had something to do with a weapon.

Q. And those conversations you would not feel could possibly support any kind of a relevant inference that Mr. Bad Horse might have been involved in that homicide and that could have been the reference?

A. No.

Q. That's not an area that you explored with regard to the defense of Bernard Fitzpatrick, is that correct?

A. If you're asking did I try to fabricate a defense, the answer is no.

Q. Did you cross-examine Miss Finch about those statements?

A. I cross-examined Miss Finch and the record will speak for what I cross-examined her regarding.

Q. Now, Mr. Adams, in your experience as an attorney, do you find that your role as an advocate for a particular side sometimes tends to affect your perception of the facts and what you tend to convince yourself of the facts that you plead? Do you ever find that?

(p. 333) A. That calls for expounding.

Q. Expound.

A. Attorneys today have the belief that their job is to defend a client. They are to represent a client to the best of their ability, to insure that his rights at every stage of the proceeding are protected. But they should never lose sight of the fact that a court of law is a court where truth is sought and should be brought forward. Answers and questions should not infer incorrect inferences. The attorney is neither honest with himself nor honest with the public nor honest with his profession if he tries to do so. When I go into a case I go in as an advocate representing a client to give him the very best of my professional ability to see that he is properly represented in the courtroom, that undue advantage is not taken of him, either by

the prosecution or by, perhaps, the laxity of the court. I've never found the courts lax, but it could be. Therefore it is my job to see that that client, my client, is represented. My approach to a problem is, if the client is innocent, I'll go to hell for him, including going to jail, if necessary, to try and protect him. If my client has, for reasons that I won't divulge, left me with the belief that he may be guilty, I will still make the state prove its charge, because that is our constitutional right, that is the system on which this government has been based, and I do my very best under such (p. 334) circumstances to see that he is protected in every stage of the proceeding, by objection, by answer, by argument and by otherwise, and to test to the fullest of my ability the truth and reliability of any statements that are put on the witness stand. A witness who is honest and does not exaggerate is a witness that need not be cross-examined. A witness that exaggerates, though they be honest, must be cross-examined and those exaggerations brought home to the jury. They may cause the jury to change its position.

In respect to this case, or any other case that I've represented a client, I've given him the best of my professional ability, and always will, but it will be within the ethics of the profession and one of those ethics is do not suborn perjury, do not try to deliberately mislead, knowing it's misleading of a jury, do not deliberately deceive, because you are in a court of law, which is a place where truth is sought and a place where truth should be brought forward.

Now, with that pontificating, I hope I have answered your question.

Q. You did not doubt it was true that Iva Lee Finch had made the statements that were recorded pre-trial, did you?

A. I did have no doubt that she will say – if you will note, the statement is somewhat leading and inferential. (p. 335) She'll answer probably most anything. She and the Morgan girl were both teenagers, led into prostitution by family circumstance, environment of which they were a product.

Q. The state's case, though, rested in part on their testimony, is that not right?

A. It rested on their testimony insofar as their indicating that Bernard Fitzpatrick and Mr. Radi were both in Hardin, Montana, that evening.

Q. And you felt that cross-examining Miss Finch based on your previous exposure wit[illegible] regard to her statements that you have just read would have been misleading because you felt that the inference that would be created would not be the truth, is that right?

A. The inference – In the first place, the inference would probably not have been the truth and, in the second place, there is nothing there that indicates that that is in any way relating to the crime alleged to have happened here.

Q. Now, when were you appointed to represent Bernard Fitzpatrick?

A. That I cannot recall specifically. I believe it was in December but I can't recall just exactly the month.

Q. And at that time were you working as a public defender in Yellowstone County?

A. I was.

(p. 336) Q. And do you recall when you first spoke with Mr. Fitzpatrick about the case?

A. I can't recall the specific date.

Q. Do you recall the month or the general time?

A. I believe it was in December.

Q. And did he indicate anything to you about his guilt or innocence in the case?

A. He had maintained his innocence throughout. He did maintain his innocence throughout.

* * *

(p. 384) Q. Now, you indicated earlier that your approach to a case is dictated to some extent by your feelings with regard to the defendant's guilt or innocence, is that right?

A. That's correct.

Q. And when you represented Paul Bad Horse, I take it that you came to the conclusion or the impression that Mr. Bad Horse was telling the truth with regard to his story that he was in Hardin elsewhere on the evening in question and was not involved in the homicide?

A. To answer that question inferredly would invade attorney-client relations, and rather than inferredly or otherwise, I will say that I will stand on attorney-client privileges regarding my knowledge or lack of knowledge of this case.

Q. Regarding Mr. Fitzpatrick's case, did you approach his case as the defense of an individual who you believed to be innocent or guilty?

A. I approached Mr. Fitzpatrick's case from the idea that Mr. Fitzpatrick was charged – He had once been convicted by a jury panel, that the jury obviously would believe (p. 385) or try to believe the facts that we presented. There was no way that we were going to be able to prove innocence. The one thing we had to do was to make the state bear its burden stronger than it had in the first case in order for him to be acquitted, and that if we could offer alibi witnesses that were honest and believable, we would offer same, and we did.

In respect to Mrs. LaVe, she is an honest lady and she testified. Some of the others I did not call.

Q. And was that because you felt that they were not honest?

A. Because I knew that they would be cut to pieces by the prosecution.

Q. Do you recall if you discussed your decision not to call those witnesses with Mr. Fitzpatrick?

A. I think in respect to some of them I did, pointing out to him that they had criminal records, the general appearance they had, that I did not intend to call them. For example, one of the alibi witnesses he intended for me to call was Miss Fetters, and I do recall that I told him that we would not call Miss Fetters – though the state wound up calling her – we were not going to call her because I considered her, to use an expression, I think the word I used with you was flaky. And that's the word I

said, "She's a little too flaky for me." Bernard said, "Yeah, I think you're right," or words to that effect.

* * *

(p. 418) A. I've probably tried and retried the case mentally two or three times before I come to court.

Q. There is no way that you can know exactly what any witness is going to say on their direct examination, is there?

A. No, sir, there isn't. So you have to just give – prepare yourself – Well, let's assume that the witness testifies to this and he testifies to that, and you think about it and you try to figure out how you would approach the problem. And that's the only way you can that I know of.

Q. Does your extensive experience in the criminal courtroom help you in preparing to cross-examine witnesses?

A. In the criminal field, the more thorough your knowledge of criminology, if I may use that word, that is, what police procedure is, what policemen do, what prosecutors can and may do, that's all helpful to you and the more you know the better prepared you are for cross-examination.

Q. Given the importance that you attach to the function of the jury in your view of the criminal justice system, did you ever talk with the jury after a criminal case is completed to see how they viewed the way the evidence was presented?

A. Sometimes I have, yes, sir.

Q. Have you ever found that to be helpful?

A. In the next case but not on that case.

Q. Do you remember when you first heard of the (p. 419) slaying of Monte Dyckman?

A. I can't remember the specific time that I heard about it. I suppose that I read it in the paper, of the incident. That was probably the first knowledge that I had. I don't recall hearing it on the radio. Maybe I did. And probably saw it on television that night. But I do recall; I believe, reading an article in the paper, because I read it almost daily.

Q. Have you ever, over the course of the past four years, since the 1978 retrial of Bernard Fitzpatrick, had occasion to think about the trial and go over it in your mind and perhaps refresh your memory with respect to certain elements of that trial?

A. Well, in regards to the last six or eight months, yes, sir, quite a few times. I don't have any regrets for the way that I did try it. I did the best job I could do. Which others might have been able to do better, but I did the best job I could do. But I have thought about things that I did do, felt that I was satisfied.

Q. I believe you testified yesterday that you represented Paul Bad Horse, Jr., in the first trial, and I believe the record of that trial reflects that you were appointed on August 30th, 1975. Would that be approximately right, to the best of you recollection?

A. That's when I first, I believe, became involved in (p. 420) the case, yes, sir.

Q. And you also testified that Chris Nelson represented Bernard Fitzpatrick, Rob Stephens represented Gary Radi, Jim Reno represented Travis Holliday, is that correct?

A. That is, as my memory serves me, correct.

Q. And while appointed to represent Paul Bad Horse, Jr., another attorney was hired to assist you in your representation of Paul Bad Horse, Jr., is that correct?

A. That's correct. That's Jerry Cate.

Q. So involved in the first trial on the defense side there were five attorneys, is that right?

A. Theoretically there were five, yes, sir. I might advise you that the Indian tribe had employed Mr. Cate to, shall we say, ensure that Mr. Bad Horse received a fair trial. Mr. Bad Horse was Indian.

Q. I believe the record will also reflect that that trial was held in October of 1975. During the course of that trial in October of 1975, did you have an opportunity to confer with the other four attorneys who were involved in the defense of the four persons charged in that trial?

A. Yes, sir, we met almost daily during the course of the trial in Mr. Stephens' office. Which happened to be, incidentally, adjacent to Mr. Cate's office.

Q. And what was the nature of those meetings? What kinds of things would you discuss? Would you share (p. 421) information about investigations that you independently undertook, for example?

A. Yes, sir. Most of it involved what the state was doing, approaches to what the state was doing. I won't

say procedural steps, I'll say an interchange of ideas as to how to best represent our individual clients, approaches that we felt could be used, suggestions. Mr. Stephens would suggest that this is what he thought he would do on behalf of Mr. Radi; we'd work around the idea. If Mr. Stephens did it, and some of us, if we didn't think it was correct, we would interpose our ideas, and we'd try to work out, shall we say, strategy. It would be a little like the military, a meeting, how can we approach this problem and approach it fairly and honestly, and present our side of the case, in effect. Now, that's what it amounted to.

Q. And you participated in these discussions?

A. Oh, I'd think that Mr. Stephens will say that I was there almost every night, if not every night.

Q. Now, during the course of this trial, this initial trial, did you come to work at 8:00 o'clock in the morning and leave at 5:00 in the evening?

A. I don't think that we had set hours. There were some nights we were up there pretty late.

Q. How late?

A. Oh, 1:00, 1:30. Other nights we might go home (p. 422) at 7:00 or 7:30. So we started our day in the morning, and I wouldn't say we started it at 8:00 o'clock, we started whenever it was necessary to be in court, and we would go through the day. Sometimes the parties would take off and have lunch alone, sometimes two of us would have lunch together. Then that night, perhaps between 5:00 and 6:00, after going back to our individual offices, we'd maybe meet at 7:00. Sometimes the sessions

were very brief and other times they would go, as I said, until 1:00 or 1:30. So our days were pretty long, some of them.

Q. Did you put on a defense at trial for your client?

A. We had anticipated possibly putting on a defense but no evidence was offered on behalf of any of the defendants. Now, there was one issue we had some problems with. Mr. Stephens first was going to go along with the idea that we would rest our case, then at the last minute he resisted on behalf of Mr. Radi and then he finally rested his case, too, without presentation of any evidence.

Q. Though you were able to use the experience that you had gained in the first trial later on in the second trial, so far as the prosecution's case went, you weren't able to know the first trial what the defense witnesses would say on the stand when the time for the second trial came around.

A. Well, let me put it this way. I had had the (p. 423) benefit of discussions with Mr. Stephens, with Mr. Nelson and Mr. Reno. We had all anticipated putting on a defense, and in a certain sequence, and the question was who went first, who went second, who went third and what their witnesses would be testifying about and what they would be testifying to, so you had a pretty good idea what everybody had anticipated presenting but not necessarily specifically what the witnesses would testify to. I knew, for example, that Mr. Radi was going to rely or try to rely on a defense of alibi and Mr. Fitzpatrick was going to rely on a defense of alibi and Mr. Holliday's defense was a different type of alibi because he was going to

admit that he was in Hardin but he was going to try and establish that he was – or Mr. Bad Horse had been, in effect, most of the evening. They hadn't been absolutely together but they had been together most of the evening in one bar after another. By bars, I mean one had moved from one bar to another, and the bars are pretty close together and the other one in effect followed him two or three minutes later.

* * *

(p. 469) I tried to make an honest, cogent argument and a sincere argument in Mr. Fitzpatrick's behalf.

Q. So it's your recollection, and the record seems to reflect, that you were consulting with Mr. Fitzpatrick and Mr. Cole throughout the proceedings, is that right?

A. Yes.

Q. Now, following the trial of Mr. Fitzpatrick – I guess I have one further question that was raised during your direct testimony yesterday with respect to a gun that had been found in the possession of or at least related to Travis Holliday. Were you aware of a .22-caliber pistol that had been linked to Mr. Holliday during the course of the first trial?

A. Yes, there was one. Last evening I thought about that gun and yes, there was a .22 that Mr. Holliday had in his possession.

Q. And what type of gun was Monte Dyckman slayed with, do you recall?

A. I can't recall but it was not a .22.

Q. Was it a .45-caliber pistol?

A. I believe it was supposed to have been a .45 caliber from the cartridges left at the scene and from the bullets removed.

Q. Are you aware of whether Iva Lee Finch or Cindy Morgan testified at the Radi trial?

* * *

(p. 475) Q. And consequently – Well, I have to ask a question before that. Was Mr. Fitzpatrick aware of the fact that you had represented Mr. Bad Horse at the initial trial?

A. Yes, sir, he was.

Q. Did you ever discuss that fact with him?

A. We didn't have to. We participated in that trial, four of us, sitting at the same counsel table, five lawyers seated at that table and four defendants – actually five defendants because Mr. Bushman also sat at that table.

Q. Did Mr. Fitzpatrick ever indicate to you that he wondered if your previous representation of Mr. Bad Horse would affect your ability to represent him?

A. No way indicated that. To the contrary, both he and I felt that my knowledge of the case would probably be advantageous. At least I felt that way.

Q. Now, these were two separate cases entirely, weren't they? They were two different trials and –

A. Yes.

Q. Different years, even, is that correct?

A. Correct. The same facts were involved but Mr. Bad Horse had been exonerated on certain of those facts,

was in jail on others of those facts, and disposition of his case was complete.

Q. Now, are you familiar with the standards relating to the admission of criminal justice promulgated by the (p. 476) American Bar Association?

A. Generally. I don't think I read all of them.

Q. Do you feel that Standard No. 3.5 under the Defense Function Standards of the standards relating to criminal justice which relate to conflict of interest would be a fairly good guide to begin from in determining whether a person has a conflict of interest?

A. There was no conflict here, none whatsoever, between Mr. Fitzpatrick's case and Mr. Bad Horse's case.

Q. And you would doubt that your representation of Mr. Fitzpatrick would violate any of these standards, is that correct?

A. Certainly didn't violate that standard.

Q. Are you familiar with a lawyer's duty to investigate or do you feel that a lawyer does have a duty to investigate the circumstances of a crime and the witnesses given to him by the defendant in your representation of him? Do you feel there is a duty to investigate?

A. There is a duty to investigate. There should be a duty to make a decision respecting the witnesses you will call. There is a duty not to suborn perjury in any way, shape or form. Yet concurrently and in conflict therewith is the fact that the State Bar Association puts you in the position that you're damned if you do and you're damned if you don't because if you don't call those

witnesses you wind (p. 477) up in a proceeding such as this, trying to explain to people that you could not suborn perjury, you could not and would not, you investigated and knew enough facts to make decision respecting who should or shouldn't be called, that you wanted to deal with truth and should be allowed to deal with truth, and yet the courts and the system says, "Now, you failed to do this and you failed to do that, let others decide whether they lied or they didn't lie." So the investigation of witnesses that you make, the knowledge that you possess regarding witnesses, I often wonder how you can reconcile the two positions. But I don't believe – I'm not an honest man by nature, I'll never sprout wings and fly out of this courtroom, but I'll promise you one thing, I try to be honest, and I do not like to put witnesses on the witness stand, having investigated them, that might be lying and that I am sure are lying. Yet you're damned if you do and you're damned if you don't.

Now, I've answered your question, I hope, in respect to that particular section of the thing. You should investigate, yet you're shorn of your ability to make decision because if you make decision as to who you will call or who you won't call, then you're damned by proceedings like these.

* * *

APPENDIX F

IN THE DISTRICT COURT OF THE
THIRTEENTH JUDICIAL DISTRICT OF THE
STATE OF MONTANA, IN AND FOR THE COUNTY OF BIG HORN.

THE STATE OF MONTANA, Plaintiff, -vs- BERNARD JAMES FITZPATRICK, Defendant.	Criminal Cause No. 1107C *ALTERNATE MOTIONS TO APPOINT NEW COUNSEL OR TO ACQUIRE APPROVAL*

COMES NOW, the State of Montana in the above-entitled action, and moves this Honorable Court as follows, to-wit:

1. To appoint counsel other than John L. Adams, Esq., who has now been appointed by this Court pursuant to Order of November 29, 1977; or in the alternative,

2. That this Court have a hearing to inquire of the defendant, Bernard James Fitzpatrick, if he is satisfied and happy with the representation of Mr. John Adams as his court-appointed counsel for the upcoming trial upon deliberate homicide, aggravated kidnapping and robbery.

This motion is based upon the grounds and for the following reasons, to-wit:

That during the first trial of this case when it was consolidated with four other defendants, being Big Horn County Criminal No. 1107, John Adams, together with

Jerome Cate, represented a co-defendant, Mr. Paul Bad Horse, Jr.

Paul Bad Horse, Jr. has obtained private counsel and this Court has allowed Mr. Adams to withdraw as counsel and has appointed him for Bernard James Fitzpatrick.

So that there will be no claims in the future by the defendant, Bernard James Fitzpatrick, it is only reasonable that this Court inquire of Mr. Fitzpatrick if his court-appointed counsel, Mr. John Adams, will fulfill the wishes of Mr. Fitzpatrick in the defense of this action.

RESPECTFULLY SUBMITTED this 14th day of December, 1977.

/s/ _____
JAMES E. SEYKORA
Big Horn County Attorney

_____
MARC F. RACICOT
Special Prosecuting Attorney

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon opposing attorneys of record at their address or addresses this 14th day of December, 1977

JAMES E. SEYKORA
Big Horn County Attorney

By /s/ J. E. Seykora
P. O. Box 551
Hardin, Montana 59034

APPENDIX G

(p.22)A. She is white.

Q. What color was her hair?

A. Brown, brown color.

Q. All during the time that you was in Hardin did you see Fitz or Gary?

A. No.

Q. Now you leave for Billings again 11:30 or midnight, right?

A. Yeah. No, it was about 12:30. We left that man's house at 11:30 or 12:00 o'clock.

Q. You left Hardin about 12:30 then?

A. Yes.

Q. And went back to Billings?

A. Yes.

Q. Did you ask where the other two, Gary and Fitz, were at when you got in that car?

A. No.

Q. Was there any conversation after you left Hardin going to Billings about anything?

A. Yes.

Q. What was that?

A. Travis told that one guy, that I don't know his name, that he wanted his gun, and Travis said something about, "You shouldn't have did something," "You

shouldn't have," – I don't know, it was referring to like, you should a hurt him or something. It was something –

Q. Hurt who?

A. They never said.

(p. 23) Q. Was you under the impression somebody was hurt or something got out of hand?

A. Well, I thought maybe that Indian guy.

Q. Which Indian?

A. Small Change might have got in a fight with one of those other guys like Gary or one of those, because, you know, I thought to myself, well you know that was probably why we never saw them, you know.

Q. But you didn't know what they were referring to when Travis told Small Change that he shouldn't have done what he did, or hurt this other person?

A. Yes.

Q. What was Small Change's answer?

A. He said, "Oh well, I had to do it."

Q. Did he say why he had to do it?

A. No.

Q. Were they serious or did he laugh?

A. Yes, he laughed, they were laughing.

Q. Both of them were laughing?

A. Yeah. Well, all of them were laughing.

Q. Who do you mean by all of them?

A. The two Indians and the lady, they were all laughing.

Q. Now was there anything mentioned on the way back to Billings, anything else mentioned about money or anything, guns?

A. Yeah. He told that Indian that he wanted his gun back.

Q. Who is "he"?

A. Travis.

(p. 24) Q. Told Small Change?

A. No, the other one.

Q. The other Indian?

A. Yes.

Q. That he wanted his gun back?

A. Yeah.

Q. Did he give it to him?

A. No. Small Change goes, "well you can't be an Indian giver."

Q. Who did he say that to?

A. Travis.

Q. Small Change said, "You can't be an Indian giver" to Travis?

A. Yes.

Q. Did you see a gun?

A. Which time?

Q. At that time?

A. No.

Q. Now you told me prior to this, I believe, that Travis said to Small Change that you shouldn't have done that.

A. Yeah.

Q. And it was Small Change that said he had to.

A. Uh-huh.

Q. Is that correct?

A. Yes.

Q. Were you confused here when you said the other Indian said this?

A. Well, okay, Small Change and Travis were talking (p. 25) about that.

Q. About guns?

A. No, about – Travis said, "You shouldn't have done that," and Small Change said, "Well, I had to."

Q. Okay.

A. And then Travis asked that other guy, the other Indian that I don't know his name, for his gun back, and then Small Change said, "Well, you shouldn't be an Indian giver, or you can't be an Indian giver."

Q. And then you continued on to Billings?

A. No, we stopped.

Q. Where did you stop?

A. In between Billings and Hardin.

Q. For what purpose?

A. They had to go to the restroom I guess.

Q. And by "they" who do you mean?

A. Small Change and Travis and that other Indian.

Q. How long were they gone from the car?

A. Oh, about five minutes.

Q. Were they in sight all this time?

A. Yes.

Q. Right beside the car?

A. Yes.

Q. Okay. Then you continued on to Billings?

A. Yes.

Q. Go ahead.

A. And then we stopped at a motel.

Q. At a motel?

A. Yes, in Billings.

Q. Which one?

* * *

APPENDIX H

IN THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF BIG HORN

BERNARD JAMES FITZPATRICK,	)	Cause No. 1107-C
Petitioner,	)	*O R D E R*
-v-	)	
THE STATE OF MONTANA,	)	
Respondent.	)	

This matter came on regularly for hearing on April 12th, 1982, pursuant to an Order of the Montana Supreme Court dated September 2nd, 1981, in which the Supreme Court remanded the above-entitled action to the District Court for the purpose of conducting an evidentiary hearing on the issue of whether the petitioner was afforded the effective assistance of counsel at the trial at which he was convicted of the offenses of deliberate homicide, robbery and aggravated kidnapping, and the sentencing procedure followed thereafter. The petitioner, Bernard James Fitzpatrick, appeared in person and with counsel, Timothy K. Ford and Robert L. Stephens, Jr. The State of Montana appeared by and through John H. Maynard, Assistant Attorney General, Marc Racicot, Assistant Attorney General, and James E. Seykora, Big Horn County Attorney. The Court having heard testimony and received evidence in relation to petitioner's contentions, and the same having been duly considered,

IT IS ORDERED that the petitioner's claim of ineffective assistance of counsel should be, and hereby is, DISMISSED on the grounds and the reasons set forth in the attached Memorandum.

DATED: Sept. 1st, 1982.

CHARLES LUEDKE
District Judge

cc: Timothy K. Ford
Robert L. Stephens, Jr.
John H. Maynard and Marc Racicot
James E. Seykora

MEMORANDUM

Petitioner was originally charged on May 20th, 1975, along with co-defendants Radi, Holliday, Bad Horse, and Bushman, with the crimes of deliberate homicide, aggravated kidnapping and robbery, all resulting from the robbery and murder of Monte Dyckman in Hardin, Montana, on April 5th, 1975. In a single trial held in October, 1975, for all defendants, Bushman testified on behalf of the State and was granted immunity. At the close of the State's case, all defendants elected to present no evidence and, upon submittal to the jury, guilty verdicts were returned, with petitioner and Radi being found guilty of all charges, and Holliday and Bad Horse being found guilty of robbery only. Upon appeal, the convictions were reversed and the cause remanded for a new trial for each defendant.

During the first trial, petitioner had been represented by Chris J. Nelson, and John L. Adams, Jr., had represented Bad Horse. After remand, Bad Horse secured other counsel, thereby releasing John L. Adams, Jr., and

Chris J. Nelson disqualified himself because of a possible conflict of interest, resulting in a sequence of events whereby John L. Adams, Jr., ultimately became appointed by the Court to represent the petitioner.

In December, 1977, petitioner asked that other counsel be appointed to represent him, because he felt that John L. Adams, Jr., did not have sufficient time to represent him in his re-trial. In response, the prosecution also requested that a hearing be held and that it be determined that petitioner be satisfied with his counsel, not only as to the time such counsel could devote to the matter, but also in view of the fact that such counsel had represented another defendant in the first trial.

A hearing was held, with the following result:

"THE COURT: Court will be in session. We have Big Horn County Criminal Cause No. 1107-C, entitled State of Montana versus Bernard James Fitzpartrick.

"Mr. Fitzpatrick, you have filed with this Court a request that the Court consider replacing Mr. John Adams as your attorney on the ground that he, being a public defender, has so much to do that he is not able to adequately take care of your case. You have likewise filed a similar request with the Montana Supreme Court and they have responded to you, and to me as well, and then, similarly, the County Attorney of Big Horn County has likewise filed a motion requesting that you be given the opportunity to express yourself on this very point. And so that is why we are convened here this afternoon, Mr. Fitzpatrick. Do you have any statement that you'd like to make to the Court at this time?

THE DEFENDANT: Yes. I do.

"I filed a motion with this Court and with the Supreme Court that Mr. John Adams was a public

> defender and did have a heavy caseload and that, but since that filing I have had a talk with Mr. Adams and Mr. Adams is working on my case, and working hard, and I am satisfied with the work and I do feel that – He assures me that his case load isn't too heavy to handle this case, and I'm inclined to believe that it isn't, and would like to withdraw whatever it is on that, keep Mr. Adams.
>
> "THE COURT: All right, I want to explain to you, the reason I appointed Mr. Adams is because, No. 1, he has been in this Court a good many years and I know he is completely competent; No. 2, he has already been through this case once and so he's familiar with all the details so he can be of more help to you quicker and easier than anybody else I could find."

Separate trials for each of the four defendants were scheduled, with Radi's case being the first. It was commenced on January 27th, 1978, before a jury of only six members, per Radi's request. The defendant Bushman, who had turned State's evidence at the first trial, could not be located, and the two young girls who traveled with the five defendants to Hardin on the night of the crime, likewise could not be found. Severely incised, and therefore disjointed, versions of the testimony of Bushman and one of the girls, given at the first trial, was read to the jury in their stead. The jury returned a not guilty verdict on all charges.

Petitioner's trial was the next one scheduled and although he and his counsel had been seeking a change of venue, they abandoned that effort in view of the Radi result so that petitioner's trial would be completed while the key witnesses, Bushman and the two girls, were still

missing. Consequently, the trial started on February 21st, 1978.

In the meantime, the results of the Radi trial brought the missing key witnesses to the surface and they became available to testify at petitioner's trial, and did so. Also, petitioner's girlfriend, who was intended as a possible, although somewhat uncertain witness for him, was prompted to come forth as a prosecution witness, telling a story different from what petitioner had instructed and expected. In the end, on March 3rd, 1978, the jury returned guilty verdicts on all counts.

Such convictions were affirmed by the Montana Supreme Court on February 7th, 1980 (*State -v- Fitzpatrick*, 37 St.Rptr. 194, 606 P.2d 1343), and petitioner's petition for certiorari to the United States Supreme Court was denied on October 6th, 1980 (449 U.S. 891).

Petitioner then commenced this instant proceeding for post-conviction relief by filing a Petition on November 4th, 1980. The State filed its motion to dismiss on November 26th, 1980, with respect to which a hearing was held on December 10th, 1980, resulting in a ruling granting the State's motion to dismiss, except as to the claim set forth in Paragraph 8(c) of the Petition. Ruling on that claim was reserved pending delivery of a transcript requested by petitioner from the case of *State -v- Radi*, which concerned alibi testimony of witnesses who had appeared in the Radi case, but who, except for one, had not been called to testify in petitioner's case. On January 27th, 1981, the Petition for Post-Conviction Relief was dismissed in its entirety, resulting in an appeal to the Montana Supreme Court which returned the cause to this

Court on September 19th, 1981, for the purpose of granting to petitioner an evidentiary hearing on the issue of ineffective assistance of counsel. Petitioner thereupon sought to disqualify the undersigned as presiding Judge by filing a motion for substitution, which motion the undersigned felt compelled to honor. The State, however, applied to the Montana Supreme Court for a writ of supervisory control, which resulted in reinstatement of the undersigned as presiding Judge. Following the taking of various depositions by both the petitioner and the State, resulting in petitioner making amendments to his Amended Petition, a hearing on the allegations of the petitioner's Amended Petition commenced on April 12th, 1982, and was concluded on April 16th, 1982, after which respective counsel filed written briefs, and the cause became submitted to the Court for consideration and decision.

At the outset, proper perspective requires recognition of the fact that the principal yardstick by which defense counsel at petitioner's trial is being measured is made up of the details and the acquittal result of the Radi trial, which preceded petitioner's trial by several weeks. It is simply a contention that since Radi was not convicted, petitioner should not have been either.

The concentration in this regard is two-fold: First, it is upon the evidentiary material which was presented on behalf of Radi and not used in petitioner's trial. Second, it is upon witnesses additional to those used by Radi, which petitioner had listed for his defense counsel but which were not called at petitioner's trial.

As to the first, the Radi trial evidence – the contention is that it should have been identically repeated in petitioner's trial, without regard to other considerations. The thought is, apparently, that since petitioner contended he was with Radi at the time the murder occurred, a finding that Radi had a successful alibi is the equivalent of finding that petitioner should have been successful in his defense, as well. The thought, with respect to witnesses additional to those used in the Radi trial, is that petitioner's success in his defense should have been guaranteed because the use of such witnesses would have cinched petitioner's alibi contentions. In other words – that the single cause of the difference in the two verdicts rendered, was a failure in the performance of petitioner's defense counsel.

This overlooks the fact that the key witnesses in the prosecution's case at the Radi trial failed to appear and testify in person, the effect of which was to dismember the prosecution's case to where it was forced to rely, in the main, upon evidence offered by casual observers who happened upon various aspects of the sequence of events. Their hindsight recollections constituted, at most, skimpy circumstantial suggestions of the possible truth – something far short of the proof required to convince a jury beyond a reasonable doubt. These realities are totally ignored in petitioner's claims of ineffective assistance of counsel, and by themselves can very easily account for the different verdicts reached.

The essence of petitioner's position, as to defense counsel's presentation of evidence, can be summarized as a contention that significant helpful evidence on virtually every area of factual dispute was not brought out at trial

through failure of defense counsel to call certain witnesses who possessed knowledge valuable to petitioner's alibi defense.

The allegations in this regard in petitioner's Amended Petition will be discussed witness by witness, in the order presented by petitioner.

DENNIS SASICH

The allegation of petitioner's Amended Petition is that this witness "could have testified that he saw Radi at the Squire Lounge in Billings on the evening of April 4th or 5th, 1975, and that he saw petitioner in that same place with Radi around the same time."

When this witness testified at the Radi trial, his testimony was that he knew Radi as a "regular" at the Squire Lounge, and that he recalled seeing Radi in the bar on a weekend in April, 1975, which he thought was the weekend of April 5th, but it could have been the next weekend, too, and he had no specific recollection as to which night – Friday or Saturday.

At the evidentiary hearing held on petitioner's Amended Petition, this witness appeared and testified to the effect that he did not know the petitioner, and had never seen him before.

The witnesses used to cover this area of evidence on behalf of petitioner were Shirley Graham and Gloria LaVe – two women who worked as cocktail waitresses at the Squire Lounge in April, 1975. Graham testified (Tr. 811) that Christine Fetters, petitioner's female companion at that period of time, was seen by her in the Lounge on the

night of April 5th, and that petitioner, with whom she was acquainted, could have been with her, although she could not remember specifically seeing him. The testimony of LaVe (Tr. 872) put both the petitioner and Chris Fetters together in the Squire Lounge at that time.

In view of this, it is obvious that the witnesses selected for use by defense counsel in petitioner's trial were much stronger in favor of petitioner than Dennis Sasich could possibly have been, since he did not even know who the petitioner was.

BARBARA HANSEN (RADI)

The allegation of petitioner's Amended Petition is that this witness and Radi were "with Fitzpatrick at several points during that afternoon and evening in bars in Billings, when the prosecution contended that the two men were in Hardin committing the instant crime."

At Radi's trial, this witness testified that she, Radi and a girlfriend, Shelley Beaumont, picked up Fitzpatrick and his girlfriend at either the Standard Bar or the Warbonnet Inn and went out drinking. (Shelley Beaumont did not confirm this, since she did not at that time know who Fitzpatrick and his girlfriend were, and says that no one joined their party that night. Radi Tr. 188 and 190.)

At the evidentiary hearing held on petitioner's Amended Petition, this witness augmented her testimony by advising that she, Radi and Shelley dropped Fitzpatrick and Christine off at a motel about 2:30 A.M. On cross-examination she modified this information by saying that Fitzpatrick and Christine were dropped off at

a lot – one she does not really know as having been connected with any motel – and following this action, they then took Shelley home. She further advised that although she is friendly to the petitioner now, in 1978 he was a stranger to her, and after the Radi trial she did not want to be a witness for him or be involved in his trial in any way. By the time of petitioner's trial, she had left the State and the investigator assisting petitioner's counsel determined that she was somewhere in Idaho, but he was not able to contact her. She had a pattern of using different names at different times and the search was dropped.

It is also noteworthy that it appears from the record of this witness' testimony in the Radi trial that the night critical to petitioner's alibi defense was a very foggy one for her because of her use of marijuana, LSD and alcohol to a point where she was, in her own words, "a mess."

Defense counsel had listened to some of the testimony given by this witness in the Radi trial and had observed her demeanor on the stand. He judged her effect upon the jury as being detrimental and generally was not well-impressed with her credibility.

At the time of Monte Dyckman's death, she was a prostitute working in Nevada, but home on a vacation and living with Radi in a "hustler" relationship, meaning her earnings as a prostitute and his profits in selling "dope" were shared between them.

Given the totality of the atmosphere which accompanied the appearance and testimony of this witness, it cannot be said that it was an exercise in incompetency to have doubts about her predictability and veracity, particularly if she were to be an unwilling witness, as she could

well have been, or to have doubts about her credibility or to be concerned over her extending an unneeded tarnish to petitioner. Other counsel may have judged the matter differently, but the decision that she was not a desirable witness, made by petitioner's defense counsel, was founded upon cognizable reasons and cannot be declared a demonstration of ineffective assistance of counsel.

HERSCHEL WILSON

The allegation of the petitioner's Amended Petition is that this witness was a wholly-uninvolved person who could have testified that petitioner was in Billings on the evening of April 5th, 1975.

This witness did not testify at the Radi trial, but he did appear at the evidentiary hearing held on petitioner's Amended Petition. He was in an intoxicated condition at such appearance. He could only say that he saw petitioner in the Standard Bar with a girl from Butte shortly after petitioner got out of prison, but he didn't know whether it was on a week night or a weekend or whether it was the night before, the night after, or the night of the Dyckman murder. Because, in his opinion, there were fights every other night in the Standard Bar, he could not remember any that the petitioner claimed to have been involved in as a way of fixing a specific date.

Clearly, this witness was neither predictable nor reliable and could not, and did not, testify that petitioner was in Billings at the time the crime occurred in Hardin.

To have used him in these circumstances would have been such a risky tactic as to have been an act of incompetency, so that failure to call him cannot be.

CHERYL WILSON

(Originally alleged as "Jackie Wilson")

The allegation in petitioner's Amended Petition is that this witness would have been an uninvolved person who could testify that petitioner was in the Standard Bar on April 5th, 1975.

This witness did not testify at the Radi trial, but she did appear, being the wife of Herschel Wilson, at the evidentiary hearing held on petitioner's Amended Petition. Her testimony was that she had never seen the petitioner before the time she walked into the Courtroom at such evidentiary hearing. With respect to the witness, Herschel Wilson, she confirmed that he had been drinking prior to his appearance in Court and also confirmed that, back in April, 1975, the Wilsons had been on a five-day drinking party at about the time of the Dyckman death.

EDNA TORSKE

The allegation of petitioner's Amended Petition is to the effect that she could place petitioner in the Standard Bar on the night of April 5th, 1975, because of a fight that had occurred in the bar, which she had discussed with the petitioner.

This witness did not testify at the Radi trial, but did appear at the evidentiary hearing on petitioner's

Amended Petition, and she testified that she did see petitioner in the Standard Bar two or three times after he got out of prison, but she did not know whether it was during the day or the night – but did advise that it could not be later than 9:00 P.M., because she did not work past that time. Sometimes she saw petitioner with a woman, but mostly he was with Bad Horse, Holliday or Radi. She was not able to recall whether the times she saw petitioner were during the week or during a weekend.

She had been contacted as the mainstay of petitioner's alibi defense even before the 1975 joint trial and, at first, was encouraging in what she would say. Shortly thereafter, however, she concluded that she had been mistaken in her memory and announced that she wanted to be left alone. She was uncooperative with everyone and, at the time of petitioner's 1978 trial, she refused to testify voluntarily when contracted several times by defense counsel, saying that she could not remember and also saying that the fight she does remember was not on the day of the murder. She felt that petitioner was trying to use her improperly. Defense counsel, based upon this, concluded that she would be destructive rather than supportive of an alibi defense and did not call her. Obviously, refusing to call an unfavorable witness cannot be called an act of incompetency.

More importantly, however, it developed at the evidentiary hearing that there was justification for Mrs. Torske being incensed at petitioner's request that she verify his presence in the Standard Bar on April 5th as the night his fight occurred. By petitioner's own admission at the evidentiary hearing, the fight was on April 4th, not the 5th, and this was confirmed by a Complaint and

Offense Report from Billings Police Department records (Exh. Y).

DON COLLETT and LAUREL COLLETT

The allegations of petitioner's Amended Petition advise that these two parties would be uninvolved witnesses who could have placed petitioner in Billings on April 5th, 1975.

Neither of these witnesses testified at the Radi trial, but Don Collett did appear at the evidentiary hearing held on petitioner's Amended Petition, but he was intoxicated and left the Courtroom before he could be called as a witness, and he could not thereafter be found, so that his testimony was not taken. The paralegal who had talked to him in preparation for the hearing advised that his recollection was even more vague than that of Herschel Wilson.

Laurel Collett was located in the hospital in Billings. Her testimony was taken by deposition at the hospital and it was only to the effect that she had seen petitioner in the Standard Bar at some time between 6:00 P.M. and 2:00 A.M. on the night of the murder for a brief period of time, while in the company of Radi, but she could not fix any specific time for this appearance.

HARRIET TORGERSON

Under the allegations of petitioner's Amended Petition, it was asserted that this witness could testify that petitioner checked into the Ponderosa Inn Motel before 2:00 or 3:00 A.M. on April 5th, 1975.

This witness did not testify at the Radi trial, but did appear at the evidentiary hearing held on petitioner's Amended Petition, and her testimony was that she checked the petitioner in "towards morning." She could not be any more specific than that, except that she was certain it would have been later than 3:00 A.M., and could have been as late as 5:00 or 6:00 A.M., with the room receipt being dated April 5th, because it was her practice that the date change was not made until after she had completed checking the books out for the previous day.

Petitioner alleges that the testimony of the witness, if used at trial, could have contradicted the prosecution's evidence as to his check-in time at the motel.

To the contrary, the effect of this testimony is to fortify rather than contradict the contentions of the prosecution. Defense counsel was aware of what Torgerson would have to say and his judgment in making use of motel records and their keeper, with the possibility of the uncertainty they might create, was a much more favorable tactic for petitioner than using a witness who would narrow any uncertainty to a time period which would not bolster his alibi claim.

CHRISTINE FETTERS

The allegation of petitioner's Amended Petition is that her testimony, which was used against petitioner at his trial, was impeachable in a number of ways.

First, it is alleged that she had a strong motive to fabricate her testimony favorable to the State because her

children, in Butte, Montana, had been taken from her, and she was under a threat of being deprived of their custody at the time that she testified against petitioner. At the evidentiary hearing on petitioner's Amended Petition this contention was denied by Fetters and was completely unsupported by any evidence whatsoever.

It was also alleged that her testimony about petitioner burying a gun in the area of the current Metra building could have been impeached by the fact that the parking lot at the Metra was completed in 1973, so that the alleged burying spot was not available. At the evidentiary hearing on petitioner's Amended Petition the evidence confirmed that construction work was in progress in 1975 in that general area where the gun was, by her testimony, buried.

At the trial, this witness had given testimony covering the financial standing of she and petitioner, as they traveled and lived during the period from the time of petitioner's release from prison until he was picked up by the authorities in Spokane, Washington, in early June, 1975. Its implication was that petitioner had lots of money and the allegation of petitioner's Amended Petition is that this testimony could have been impeached by the testimony of Robert Miller and Jim Doane (amended by hearing date to "Roane"), who could have testified to loaning the witness Fetters approximately $300.00 via telegraph and, also, by Montana Power Company records to demonstrate that she did not use up her welfare check proceeds to pay the bills she claimed to have paid in April, 1975, thereby making them unavailable for their use while traveling. The evidence received at the evidentiary hearing on the Amended Petition was that the

$300.00 amount was, in reality, only $20.00 received from her brother, Jim Roane, and $30.00 from her father. Robert Miller, who could not be found for petitioner's trial or for the evidentiary hearing on his Amended Petition, was a person known to this witness as one who has been on the run since 1975 because of outstanding drug charges against him. The testimony of this witness at the evidentiary hearing was to the effect that Miller had been told by petitioner to say that he had loaned him $280.00, in the event he was asked. It is noted, incidentally, that the name, Robert Miller, is a pseudonym sometimes used by petitioner (Plaintiff's Exh. 1).

With respect to the financial circumstances surrounding the petitioner, witnesses were presented on his behalf concerning money loaned or given to petitioner during the period of time in question. They were Mary Christensen (Tr. 890) and Dorothy Wilkins (Tr. 1,036). Additionally, financial information was elicited in the cross-examination of witness, Leslie B. Dieckman, as well as through a written affidavit of James Blodgett, of the Montana State Prison. Christensen, petitioner's sister in Billings, testified that she sent petitioner $100.00 at the time of his release from prison, and $300.00 or $350.00 before he and Christine Fetters left for Salt Lake, and thereafter sent more money in amounts of $10.00, $20.00, or $30.00 at a time, and that she knew that another sister of petitioner, who was in Billings to attend a wedding at that time, also sent money to petitioner. In addition, she wired $20.00 or $30.00 to petitioner at the time they were in Spokane, and this was done on two occasions. Wilkins verified on behalf of petitioner that she had loaned the amount of $200.00 or $300.00 to petitioner and Christine.

The testimony of Dieckman verified the pawning of jewelry and the sale of an automobile in Spokane in order to raise money. The affidavit of James Blodgett verified that, at the time the petitioner left the prison, he had $93.00 in his own prison account, plus $100.00 from another inmate, Gus Gardner. He would also receive $25.00 as release money. Finally, petitioner, in his own testimony, explained that he made money through the sale of drugs in Butte shortly after his release from prison in an approximate amount of $500.00.

Clearly, the petitioner's version of the status of his financial standing was presented in contradiction to what Christine Fetters contended and petitioner has no basis for complaint on this score.

Also alleged, with respect to this witness, is the claim that she had heard a radio broadcast about the Dyckman murder on the morning of April 6th, 1975, was incorrect and could have been impeached by police, radio and news service records. At trial, the testimony was that news of the murder was common knowledge in the Chuck Wagon Cafe in Hardin at 7:30 A.M., April 6th (Tr. 107). The evidence received at the evidentiary hearing on the Amended Petition also demonstrated that the news of the Dyckman murder was on the wire at least as early as 10:00 A.M. on April 6th, 1975, so that the records referred to would have confirmed rather than impeached this testimony. However, at the hearing on the Amended Petition, this witness did amend her recollection by advising that she recalls it was dark outside when she heard the news on a radio playing loudly in the next room of a motel in Butte, after their return from Billings via a bus. Since the bus did not arrive in Butte until Noon on April

6th, it had to be the next morning, April 7th, when she heard the news on the radio.

Petitioner has characterized Christine Fetters as a "surprise" witness. Actually, she had been listed by petitioner as one of his alibi witnesses long before the trial, and by the time the trial date approached, both Larry Cole, as investigator, and petitioner's defense counsel had ascertained that she was not a desirable witness. She had made it clear that what she would say would not be favorable to petitioner. Nevertheless, on the day the 1978 trial commenced and the prosecution moved to endorse Christine Fetters as a prosecution witness, along with others, objection was made by defense counsel that she was intended to be a defense witness, and also that she may be in a common-law-wife relationship with petitioner. As early as before the first trial in 1975, petitioner's counsel at that time, Chris J. Nelson, had concerns about her value as a witness. Although she would say what he wanted to hear, it was not convincing or credible.

Christine Fetters was not a surprise witness. The only surprise was that she departed from what petitioner wanted her to say in favor of the facts as she remembered them.

In summary, the evidence does not support the petitioner's allegations that the testimony of this witness was readily impeachable on the points and in the ways contended.

IVA LEE FINCH and CINDY LEE MORGAN

These two young ladies, both 15 years of age in 1975, were a part of the group which traveled from Billings to Hardin in the company of Holliday, Bushman and Bad Horse. They were to work for Holliday as prostitutes. Prior to leaving Billings, Holliday gave each of them a one-half "hit" of LSD. At the first trial, when all defendants were tried together, these witnesses testified and admitted the LSD usage and the effect it had upon them, but contended that it did not destroy their memory of the events of that evening. It is the allegation of petitioner's Amended Petition that petitioner's defense counsel at his second trial failed to adequately bring out the effect of the LSD upon these two witnesses. With respect to this, the trial transcript speaks for itself, and an examination of the cross-examination conducted by defense counsel of these two witnesses and the testimony of Dr. Ned Tranel demonstrates that it was adequately covered.

ROBYN VANDERSLOOT, NOW, SPAULDING

It is the allegation of petitioner's Amended Petition that this witness, who saw Dyckman in an automobile with two individuals, could have testified, if called, to the effect that the hair colors and styles of the two people with Dyckman were different than those worn by Radi and petitioner. At the evidentiary hearing held on the Amended Petition, this witness advised that, in 1978, she was in Alaska, that she had been contacted by some attorney, but could not remember who, and also that she would not be able to describe the color and hairstyles of the two people she saw in the car with Dyckman, and

that all she can say to any degree of certainty is that neither of them was Fred or Raleigh Kraft, being persons toward whom petitioner's case was attempting to point a finger of suspicion because Raleigh Kraft had once worked for the Safeway Store with Monte Dyckman and had admitted to thoughts of stealing Safeway bank deposit money.

KENNY ELMO and JIM DOANE

The allegations of petitioner's Amended Petition, is to the effect that these two witnesses, one of whom testified at the Radi trial, could have testified that they saw a car following the victim's car which appeared to be a blue two-door Impala Chevy, with 22 Big Horn County license plates.

At petitioner's trial, the subject matter of the car seen to be following the victim's car was covered by the witnesses, Everett Knows the Ground and Effie Knows the Ground, and Monte Doane. Everett's testimony brought out the fact that he thought the license plate County designation number was 22, and that his impression was the make of the car was Chevrolet. Effie's testimony designated it as a dark colored, medium-sized car. Monte Doane testified that the car following was an Impala, and that he thought it had a 22 license plate, and the headlights were one on top of the other (Tr. 672, 674, 677). Kenny Elmo and Jim Doane were passengers riding in the back of Monte Doane's pickup, and if they had testified to the effect that petitioner claims, it would only have been repetitive of evidence already received. Further, the automobile identification as a Chevrolet of '60's vintage

was emphasized by defense counsel in his cross-examination of Sheriff Brown (Tr. 339 and 766) and in the Ronald Potts testimony (Tr. 506), as well as in the cross-examination of Lyle Doane.

ART MULKEY

As a further allegation concerning identity of the car following, which the prosecution contended was Radi's, was that the grill, headlight and taillight designs of the Impala of '60's vintage, and the '71 Pontiac driven by Radi, were clearly distinguishable. At the Radi trial, a witness, Art Mulkey, who was a body and fender repairman and also a dealer in automobiles, described these differences. At the time of petitioner's trial, Art Mulkey was in Georgia and refused to come back to testify, advising that he had done it for the Radi trial only as a personal favor to Radi's attorney. In essence, the Mulkey testimony advised that a '68 or '69 automobile basically had duel headlights on either side, with a horizontal configuration in the front grill area, and generally round-appearing taillights. The '71 Pontiac would have single headlights, a vertical configuration in the grill area, and oblong taillights, whose appearance could not be confused with round ones.

The total effect of the testimony elicited by petitioner's counsel at his trial, through the witnesses Effie and Everett Knows the Ground and Monte Doane, was that on the automobile they saw following the victim's car the headlights were duel (Doane) and the taillights were round (Everett). Additionally, Radi himself testified in petitioner's trial that his car was a 1971 Pontiac Grand

Prix with single headlights and County 3 license, which did not have any double twos in its number. Also, a picture of the grills of a 1968 Chevy Impala and a 1971 Pontiac Grand Prix were entered into evidence, so that the jury would have them for comparison purposes and their significance was pointed out in final argument on petitioner's behalf (Tr. 1,239).

From this it is clear that, first of all, confusion and contradictions characterized the testimony of automobile identification and, second, that on the only points where there was consistency, it was in the petitioner's favor. In these circumstances, defense counsel was exercising prudent judgment in considering it shaky proof for the prosecution, and letting it go at that.

EDWIN BUSHMAN

Petitioner alleges that this key prosecution witness could have been impeached as to his testimony that the victim was depositing store receipts at a drive-in bank at the time of the crime, in that Everett Stoltz could have been called to testify that the store deposits were to be at the main downtown bank, but he was not.

The record demonstrates, however, that Everett Stoltz did testify, and he covered that very point, both on direct exam (Tr. 612) and cross-examination (Tr. 623, 624, 625, and 630).

Petitioner also contends Bushman could have had the finger of guilt directed at him, if Larry Cole, the defense investigator who testified in the Radi trial as to the time required to drive from the Hardin Post Office to Toluca

and return to the Post Office, had been called in petitioner's trial. The purpose would have been to show that Bushman could have committed the crime, and still be at the places he was seen in Hardin that night.

This point was brought to the attention of the jury directly, and with an affirmative result, in defense counsel's presentation of the testimony of Sheriff Brown (Tr. 776). To the extent Mr. Bushman's testimony was impeachable on this point, it was done more directly and more clearly in petitioner's trial than in the Radi trial. (Compare Cole's Radi trial testimony at page 56.) Also, Bushman was cross-examined concerning the same point (Tr. 223).

RALEIGH KRAFT

Petitioner alleges that the testimony of this witness could have been impeached in that he testified that he first heard of the crime from his brother, Fred, on the morning after it occurred, when Fred had given a written statement as follows:

"Q. Who told you about the shooting?

"A. Luke Bushman.

"Q. What day was this?

"A. I don't know. It was a week or so afterwards.

"Q. What brought up the subject?

"A. Raleigh and I started bugging him about it.

"Q. What did Bushman say?

"A. About how they were riding around in Billings and how they all ended up in Hardin," etc.

The testimony of Raleigh Kraft at petitioner's trial (Tr. 653 and 654) orients the time, meaning and circumstances surrounding the conversation with Bushman, referred to as being "told about the shooting." The evidence is clear that news about the crime was publicly known in the Hardin community shortly after it happened (Tr. 107). Petitioner misreads the Fred Kraft statement in assuming that Fred had not even heard of the crime until a week or so later, when Bushman told he and Raleigh about what had happened in the shooting of Monte Dyckman.

RONALD POTTS

Petitioner alleges that defense counsel failed to bring out prior inconsistent statements of this witness with respect to the description of the car he saw parked in front of Safeways. The record shows that defense counsel at petitioner's trial not only cross-examined this witness, but also called him on behalf of petitioner for the purpose of examining him on the basis of the written statement given to authorities, including his description of the car (Tr. 502, 511 and 520). Whether under a hindsight review, different or other inquiries could have been included in the examination, is not a proper measure of ineffective performance of counsel.

IRENE GIRARD and BARBARA HOWELL

Petitioner alleges these people, being his mother and a sister, should have been presented by defense counsel

to verify that they had sent him money, by way of demonstrating his lack of funds after the crime. The deposition of these witnesses was taken for presentation at the evidentiary hearing, and they demonstrate that Girard had sent $50.00 and Howell $20.00, in May or June, 1975.

Petitioner also asserts that Western Union records should have been presented at trial to confirm these transmittals, as well as the records of an employment agency in Salt Lake City, to show petitioner obtained employment.

In the total picture of this financial debate, the minimum monies forwarded by petitioner's mother and sister cannot be considered significant. Also, they were not items at issue, since Chris Fetters' testimony agreed that small amounts had been received at various times by petitioner from his relatives.

With respect to the Snelling & Snelling records, the employment agency in Salt Lake City, the record demonstrates that there was likewise never any issue with respect to the fact that the petitioner had applied for work through this agency. Both Chris Fetters (Tr. 594) and petitioner (Tr. 1,068 and 1,076) testified he sought work, found a job at Sambo's, but did not take it; and petitioner's testimony explains his version of the reasons why. There was no issue existing during the course of petitioner's trial to prompt the use of Snelling & Snelling records.

KEN GREENE

The allegation of petitioner's Amended Petition as to this witness is that, as an attorney working with the

Defender Project at Montana State Prison, he had "advised petitioner shortly before his release from prison that if he did not leave the State of Montana, he would be constantly picked up as a suspect and possibly charged with any crimes committed in the area in which he resided." This information, petitioner contends, could have countered any prosecution claim that his departure from the State circumstantially indicated his guilt.

Defense counsel, under the posture of the case at the close of the prosecution's case in chief, regarded evidence of such advice as irrelevant to petitioner's defense. The evidence was that petitioner, instead of leaving the State, had stayed in Butte and repeatedly made trips to Billings, even after the Monte Dyckman murder. The tactic of defense counsel to counter any claim by the prosecution of flight by petitioner, was to point up the fact that petitioner had not fled, but in fact had returned to Billings subsequent to the crime. This position was brought out by defense counsel with some emphasis in his final argument to the jury (Tr. 1,301).

In hindsight retrospect, one dissatisfied with the results of his trial can contend that a different tactic should have been employed – but there were logical reasons for the course counsel pursued and it, therefore, is not any indication of ineffectiveness in the service rendered.

This conclusion is fortified by realization of the fact that if defense counsel had pursued the tactic through which the testimony of Ken Greene would have been supportive, its incongruity would have been subject to

the exposure that petitioner had not, in fact, fled immediately upon release from prison or even following the crime, but returned to Billings both before and after. In such case, the complaint now would be that the use of Ken Greene constitutes proof of ineffectiveness of counsel because it represented an unsupportable and irrelevant approach.

FORENSIC EVIDENCE FROM THE MURDER SCENE

Petitioner alleges in his Amended Petition that, in effect, the negative results of fingerprint tests and tests as to soil and blood samples, with respect to petitioner's boots, were not presented by defense counsel and they would have circumstantially supported his defense. A review of the transcript of the trial disposes of this allegation.

The witness, Carl W. Zarndt, F.B.I. agent, testified on cross-examination that no prints of value were lifted from either the exterior or interior of the Monte Dyckman vehicle (Tr. 112). Sheriff Brown, also on cross-examination, testified the footprints at the crime scene did not match either petitioner or Radi, and that, similarly, no match of fingerprints was made as to either of them (Tr. 347).

LARRY COLE

Petitioner alleges in his Amended Petition that defense counsel was remiss in not calling the investigator assigned to him, being the same investigator who assisted Radi's defense counsel, to demonstrate that a proper

chain of custody was not maintained in the storage of the Radi vehicle, permitting the shell cartridge, allegedly found in the Radi vehicle and admitted against petitioner, to have been planted there.

At the evidentiary hearing, Larry Cole advised that there was a discussion with defense counsel about his testifying in petitioner's trial, and they decided against it, although he was unable to recall the reason why – other than that since petitioner's defense was alibi, there was a question of relevancy with respect to matters concerning the Radi vehicle. If petitioner was not in Hardin the night of the crime, which is what his defense was, the contents of Radi's automobile weeks later would be immaterial as to petitioner.

ROBERT McRAE

Petitioner's Amended Petition alleges that defense counsel should have called this witness, a college teacher in Physics, to testify, as he had in the Radi trial, that it was extremely unlikely or impossible for the shell casing allegedly found in the Radi vehicle to have been where it was allegedly found.

McRae was contacted by Larry Cole in connection with petitioner's case, and his testimony was discussed. A decision was made not to use it because it was not germaine [sic] to an alibi defense for petitioner, as compared to Radi, in whose automobile the .45 cartridge was found when he was arrested in Wyoming.

FURTHER INVESTIGATION

Petitioner alleges in his Amended Petition that in addition to the specific items discussed above, further evidence was available, presumably favorable to petitioner, but which defense counsel failed to present; and that the existence of such evidence would be shown.

The evidentiary hearing, however, adduced no such further evidence and, in fact, it appears that the investigation which was conducted on behalf of petitioner, showed exactly the opposite – namely, that as discussed above, the allegations concerning defense counsel's failure to call certain witnesses or present certain evidence were not properly supportable in the manner alleged. (*See*, State Exh. 13.)

INSUFFICIENT DEFENSE LEGAL RESEARCH

The generalized allegations under this heading in petitioner's Amended Petition have, for the most part, already been discussed and ruled upon in the Court's prior Order dismissing petitioner's Petition, which Order has been affirmed by the Montana Supreme Court. As to any others, petitioner did not establish anything at the evidentiary hearing concerning any failure of defense counsel in connection with the jury. In fact, State Exh. 13 demonstrates the allegations to be completely unsupported.

In the subject area of jury knowledge concerning previous activities relating to charges arising out of the murder of Monte Dyckman, petitioner's counsel fought successfully to bring to the jury's attention the fact that

the trial of Radi upon the same charges produced a not guilty verdict (Tr. 241 and 251).

INSUFFICIENT TRIAL PREPARATION

This contention was discussed in the Findings of Fact and Conclusions of Law previously issued on January 7th, 1981, in which, at page 20, it was stated as follows:

> "At the outset, petitioner attempts to show that there was insufficient defense preparation at, and prior to trial. Omitted from the 'facts' is recognition that defense counsel had served as counsel for a co-defendant in the first trial of this cause and already had detailed familiarity with the case, so that there is no significance to be presumed from the facts alone surrounding the date of his appointment to serve this petitioner, or the date upon which inception of consultation with the petitioner commenced. The facts which petitioner relies upon to support his claim of insufficient defense preparation are merely conclusory allegations and, as such, are insufficient."

The only item of evidence offered in this connection at the evidentiary hearing, was Exhibit AF, purporting to show that defense counsel, during December, 1977, and January and February, 1978, was burdened with a total of 47 pending criminal cases. The point is that, being so burdened, he was unable to properly prepare for petitioner's trial.

Exhibit AF is a classical example of how a caseload listing, by itself, can be deceptive and misleading. As examples: Case #10259 was actually closed as to Adams, in May, 1977, and was still alive in December, 1977, only because of the existence of a co-defendant represented by other counsel. The same is true of Case #10332. #10449

was closed on December 1st, 1977. #10461 was dismissed December 5th, 1977. #10491 was completed December 5th, 1977, and #10489 was completed on December 19th, 1977. Adams withdrew from #10460 on January 11th, 1978, and a guilty plea in #10478 occurred on that same date. #10500 was dismissed December 5th, 1977, and #10521 was closed on December 1st, 1977. #10577 and DC-78-002 were both closed on January 9th, 1978. None of these cases involved trial time or trial preparation and the Freeman murder case, which petitioner mentioned in his testimony, did not go to trial until April, 1978. #10568, shown as an active case in December, 1977, and January, 1978, is one in which Adams was not appointed counsel until March 22nd, 1978, being after petitioner's trial.

An examination of the records will further show that under the pace of Court calendaring, the cases filed subsequent to #10557 in which a contest developed would not mature until in April or May, 1978, or later. Those which would close earlier would be by way of guilty pleas.

It follows that Exhibit AF falls short in its probative effect on the point urged by petitioner.

SENTENCING

Petitioner alleges in his Amended Petition that defense counsel presented no evidence in mitigation, although such mitigating evidence was available through his mother, his doctor and hospital records.

At the evidentiary hearing, there was no evidence presented as to any doctor or hospital records relating to

treatment of petitioner for dizzy spells and headaches. Petitioner's mother, Irene Girard, whose testimony was taken by deposition, did advise of dizzy spells suffered by petitioner as a child, resulting in his ears being lanced. However, because of a family break-up, her contact with petitioner was very spotty over the years. She left when he was 7 years old and she saw him for a period when he was 15, again when he was 17, and finally on a brief visit when he was 22 or 23 years old. She had not seen him since, although petitioner did advise his mother in a telephone conversation at a time when he was confined in the Montana State Prison, that he was still having dizzy spells, but the records of the prison made no mention of that fact or of any history of headaches.

At the evidentiary hearing, Chris Fetters recalled that petitioner had told her that he had lied and attempted to use headaches and dizzy spells in the past to excuse his conduct. It is not made clear by petitioner what the relevancy might be with respect to dizzy spells and headaches in connection with the sentencing process. No specificity is provided as to how it could enter into sentencing as a mitigating factor provided by the statutes.

In connection with the deposition of Irene Girard, Respondent's Exh. A was attached and discussed as a part thereof. It consists of a questionnaire submitted by the Montana State Prison Reception Unit to Mrs. Girard, seeking background information in connection with petitioner's reception at some time into the Montana State Prison. To it is attached a letter written by Mrs. Girard, which outlines the developmental history of petitioner. It

mentions petitioner being expelled from school, his membership in a school gang, car thefts, juvenile commitments, attempted escape, A.W.O.L. from the Army on two occasions, acquittal upon a charge of killing a man with his bayonet, transporting a stolen car across State lines, and going through a period of being "knife crazy," among other significant points.

As the record shows, defense counsel was well acquainted with the petitioner's history over a substantial period of time and, whether it was a conscious choice or merely good luck, to prefer a passionate plea in place of an exploration into the facts beyond those being divulged by the prosecution, this item of information demonstrates that doing anything other than what was done had its pitfalls.

The remaining areas touched by petitioner's allegations on performance of defense counsel at sentencing appear to already have been considered and ruled upon both by this Court and the Montana Supreme Court in prior proceedings.

Defense counsel did admit at the evidentiary hearing, in connection with the sentencing phase, that one mistake was made – namely, that he informed the Court that the slaying of Alfred Falcon in Montana State Prison was a matter of self-defense, when, in fact, petitioner denied having committed it at all. He had originally been convicted of such charge, which was affirmed on direct appeal, but was later overturned in a post-conviction proceeding, resulting in the charges being dismissed. Defense counsel's copy of petitioner's pre-sentence investigation conducted in connection with sentencing at the

first trial, and which was found in Chris J. Nelson's file (petitioner's former attorney), did contain notations indicating that petitioner had admitted the prison slaying. At the evidentiary hearing, Mr. Nelson indicated that part of his sentencing strategy was to point out that, although petitioner admitted previous crimes, he maintained his innocence in this case, thereby fortifying an attempt at credibility. This notation could have mislead [sic] defense counsel at the time of sentencing on the re-trial in 1978.

In any event, the Court did not consider the conviction in connection with sentencing, other than that, although it could not be considered a matter in aggravation, neither could it be considered a matter in mitigation on behalf of petitioner.

At the evidentiary hearing, the witness Christine Fetters did testify that petitioner had made admissions to her saying that, with respect to the murder of Alfred Falcon, it was something that had to be done because he was a beast and was taking over the prison. In view of this, the slip of defense counsel in saying it was a matter of self-defense casts petitioner's relationship with the incident in more favorable light than what the prosecution could possibly have presented if it became a contested point.

CONFLICT OF INTEREST

One of the grounds asserted against petitioner's defense counsel is that, because he had represented Bad Horse at the first trial, he was caught in a conflict-of-interest situation with respect to petitioner, i.e., he could not put the blame upon Bad Horse for petitioner's crimes.

As a result of the first trial, Bad Horse had been acquitted of the charges of deliberate homicide and aggravated kidnapping, so that at the time of petitioner's trial in 1978, there was no basis for any possible conflict of interest as to petitioner's position with respect to such charges. As to the remaining charge still outstanding against Bad Horse, that of robbery, all of the evidence developed at the first trial, and all of the investigation conducted thereafter, including the basis for the charges then pending against Bad Horse, cast him in the role of a person accountable for robbery by reason of his conspiring and his aiding and abetting its accomplishment. The petitioner's voluminous notes prepared on the basis of the evidence presented in the first trial, plus petitioner's additional thoughts and suggestions, which are included in the material attached as an exhibit to his pre-evidentiary hearing deposition, taken February 17th, 1982, and also admitted into evidence at the hearing as State's Exh. 11, failed to suggest any basis whatever for a conflict of interest between petitioner and Bad Horse. Except for the conspiracy aspect, the parts played by each were physically separated with respect to petitioner's alleged activities.

Thus, the basis upon which petitioner now urges the thought of the existence of a conflict of interest is totally imaginary, even in the innuendo that a pre-trial statement given by Iva Lee Finch (Defendant's Exh. AE) provides specifics. When traveling in Bushman's automobile on the way back to Billings, she overhead Holliday tell Bad Horse, "You shouldn't have did something," to which Bad Horse replied, "Oh, well, I had to do it," whereupon all of the other car occupants, being four in number,

laughed. Blowing an 18-year-old boy's head off with two .45 caliber shots could hardly have been a laughing matter. Defense counsel, with his knowledge of the case, interpreted this exchange as a reference to Bad Horse's pugilistic nature – he being a trophy-winning fighter, whose trophies were on display in the bar run by Raleigh Kraft's father. Iva Lee Finch, in her statement, had made the same assumption (Exh. AE, p. 23).

Petitioner does not mention the fact that interwoven in the same conversation was the request of Holliday to Bushman, "He told that Indian he wanted his gun back," to which the Bad Horse response was, "You can't be an Indian giver."

As a review of the total evidence will reveal, Raleigh Kraft, when employed by Safeway, had talked about stealing Safeway bank deposits, and he admitted to this. Also, in addition to the indication that Holliday had given Bushman a gun, when Bushman's car was later searched after the crime, a bloody handkerchief, boots with blood on them, and a ski mask were found.

As a result, and as petitioner's notes in State's Exh. 11 show, petitioner's wish was to target Bushman and Kraft as the culprits of the crime in lieu of himself. This was the course pursued by his counsel. Except through the exercise of post-trial speculation and imagination, there is no basis whatever for the existence of a conflict of interest. Pre-trial, the prosecution had suggested that possibility, and petitioner had nevertheless expressed his desire to retain his counsel on the case.

JOHN L. ADAMS, JR.

At the evidentiary hearing, evidence was developed to show that petitioner's defense counsel, Mr. John L. Adams, Jr., graduated from Montana State University Law School in 1954. He became a deputy County Attorney in Billings, Montana, in 1956, and was elevated to the office of County Attorney in 1965. He served in such office until 1970. From 1970 to the present, he has served continuously as Court-appointed defense counsel in the District Court. His legal work has been almost exclusively in the field of criminal law and he has tried more criminal cases than any lawyer in the State of Montana; and he has tried a number of capital cases.

Following the trial and the sentencing, the petitioner first wrote his counsel (copies of which are a part of the Court record) with displeasure. He later recanted and wrote again advising that a lot of what he had previously said was not true, and that "you are a very competent lawyer and you were more than competent at my trial."

At the evidentiary hearing, petitioner advised that the reason he recanted was only to keep his counsel on the case during its appeal to the Montana Supreme Court. Following the rendition of an unfavorable result by the Montana Supreme Court, petitioner again returned to his accusations of incompetency, revolving about the items of evidence and uncalled witnesses embraced in his Amended Petition and treated in this proceeding.

The result confirms, when considered in the totality of the entire record, that the petitioner's recanted position was the more correct one. Although he has been

proffered as being one having only an eighth grade education, and completely unlearned in the law, the record shows that what he has lacked in formal training has been made up through practical experience as a law violator for most of his life. He has even handled one of his own proceedings before the Montana Supreme Court (*Petition of Fitzpatrick*, 154 Mont. 512, 446 P.2d 507), and was described as a "sophisticated defendant" by his attorney, Chris J. Nelson, at the time he testified at the evidentiary hearing.

From a review of the entire record in this proceeding, the petitioner's claim appears as a labored effort to convert hindsight minutae into purported proof of ineffectiveness of counsel. The evidence does not support such a claim. Rather, it shows that defendant's counsel exercised not only competency, but in some instances an innate wisdom in deciding what evidence to present and which witnesses to call in petitioner's best interest.

The petitioner's Amended Petition must, one again, be DENIED.

Respectfully submitted,

/s/ Charles Luedke
District Judge

APPENDIX I

Bernard James FITZPATRICK,
Petitioner and Appellant,

v.

STATE of Montana, Respondent
and Respondent.
No. 82-476.

Supreme Court of Montana.

Submitted June 2, 1983.

Decided Oct. 6, 1983.

As Amended Oct. 13, 1983.

Rehearing Denied Nov. 10, 1983.

Denial of petition for postconviction relief was affirmed on all claims save that of ineffective assistance of counsel, 638 P.2d 1002, and case was remanded for an evidentiary hearing. The District Court of the Thirteenth Judicial District, County of Big Horn, Charles Luedke, J., entered order dismissing amended petition for postconviction relief and petitioner appealed. The Supreme Court, Haswell, C.J., held that: (1) failure of defense counsel to call certain specified witnesses in addition to those used by petitioner's codefendant was not a basis for establishing inadequacy of defense counsel, notwithstanding that codefendant was acquitted on all counts, whereas petitioner was found guilty, where it was apparent from record that those witnesses were so lacking in predictability and veracity as to have rendered any testimony which they could have given detrimental to petitioner's case, and (2) even if there was a possible conflict

of interest on part of defense counsel, conduct and statements made by petitioner in pretrial hearing with regard to possible appointment of other counsel, together with petitioner's failure to broach subject at trial and/or on appeal and knowledge on part of petitioner from outset that counsel had defended a codefendant during first trial, amounted to a waiver by petitioner of his right to raise issue on motion for postconviction relief.

Affirmed.

Morrison, J., concurred specially and filed opinion.

Shea, J., dissented and filed opinion.

Stephens & Cole, Robert L. Stephens, Jr., argued, Billings, Timothy K. Ford, Seattle, Wash., for petitioner and appellant.

Mike Greely, Atty. Gen., John Maynard, Asst. Atty. Gen., argued, Helena, James Seykora, County Atty., argued, Hardin, for respondent and respondent.

HASWELL, Chief Justice.

Petitioner, Bernard J. Fitzpatrick, appeals an order of the District Court of the Thirteenth Judicial District of the State of Montana dismissing petitioner's amended petition for post-conviction relief.

In October 1975, petitioner Bernard J. Fitzpatrick and four others, Gary Radi, Travis Holliday, Paul Bad Horse and Edwin Bushman were tried by a jury on the charges of deliberate homicide, aggravated kidnapping, and robbery of Monte Dyckman, a Hardin Safeway supermarket clerk. Petitioner was found guilty on all counts and was sentenced to death. On appeal, this Court reversed the

conviction of all the defendants and on October 19, 1977, remanded the cases for separate retrials. *State v. Fitzpatrick* (1977), 174 Mont. 174, 569 P.2d 383. The question of effective assistance of counsel was an issue on this first appeal. *Fitzpatrick*, 569 P.2d at 389.

On November 29, 1977, attorney John L. Adams, Jr., was appointed by the District Court to represent petitioner at his retrial. In December 1977, both the State and petitioner filed motions asking the District Court to appoint counsel other than Adams, who had represented codefendant Paul Bad Horse in the first trial, or to have a hearing to see if Fitzpatrick was satisfied with Adams as counsel. Petitioner's motions were filed pro se. A hearing was held on January 16, 1978, at which time Fitzpatrick withdrew his request, stating that he wished to keep Adams as his counsel.

At his second trial in 1978, Fitzpatrick was again convicted of deliberate homicide, aggravated kidnapping, and robbery. He was again sentenced to death. During that second trial, his sentencing hearing and the subsequent appeal, he was represented by John L. Adams, Jr. This Court, after hearing oral argument on two separate occasions, affirmed his conviction. The United States Supreme Court twice denied certiorari. *Fitzpatrick v. Montana* (1980), 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 118, and *Fitzpatrick v. Sentence Review Division* (1980), 449 U.S. 891, 101 S.Ct. 252, 66 L.Ed.2d 119.

Fitzpatrick then filed a petition for post-conviction relief in Big Horn County. The District Court dismissed all claims in that petition but reserved ruling on his claim No. 8(c), which charged ineffective assistance of counsel.

The District Court denied petitioner's motion for reconsideration or amendment. Fitzpatrick then appealed the denial of the petition for post-conviction relief. This Court affirmed dismissal of the other claims and remanded the cause to the District Court for an evidentiary hearing solely on the issue of ineffective assistance of counsel. *Fitzpatrick v. State* (1981), Mont., 638 P.2d 1002, 38 St.Rep. 1448. A five-day hearing was held in April 1982. On September 1, 1982, the District Court issued an order and memorandum dismissing that claim. Fitzpatrick now appeals.

Post-Conviction Relief:

Because the post-conviction procedure is a civil remedy, the failure to present claims in earlier proceedings will not bar them from presentation at this time. Nevertheless, the fact that an issue is not raised at a pretrial hearing, during trial or on direct appeal will be considered by this Court as an element bearing on the merits of that particular claim.

The language of the statute providing for post-conviction relief is clear. Section 46-21-101, MCA. *Circumstances in which validity of a sentence may be challenged,* presents a two-part test which a petitioner must meet in order to qualify for such relief. The statute reads:

> "A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal *and* who claims that sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, or that the sentence was in excess of the maximum authorized

> by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court which imposed the sentence or the supreme court to vacate, set aside, or correct the sentence." (Emphasis added.)

The first element of the test which a petitioner must satisfy is that petitioner be "adjudged guilty of an offense in a court of record who has no adequate remedy of appeal . . . " This phrase does not mean that a petitioner may avail him or herself of the appellate review process, and, when the results are unfavorable, utilize the post-conviction review procedure to, in effect, file numerous and successive "appeals." The language of the statute for part one of the test clearly intends this form of relief to be available to convicted persons who have had their sentences reviewed by the appellate court. It is clearly an abuse of the relief procedure to withhold issues which could and should have properly been raised on appeal, or to manufacture issues years later, in an attempt to manipulate and obstruct the criminal justice process.

Such abuse of the statute is particularly apparent in this case where the petitioner has had such extensive experience in the criminal justice system. Clearly, the statute was intended to prevent the miscarriage of justice, not to provide an opportunity to manipulate and obstruct justice. As the United States Supreme Court so succinctly stated in a recent opinion, "when the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot v. Estelle* (1983), ___ U.S. ___, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). The Court further quoted from *Lambert v.*

Barrett (1895), 159 U.S. 660, 16 S.Ct. 135, 40 L.Ed. 296, as follows: "It is natural that counsel for the condemned in a capital case should lay hold of every ground which, in their judgment, might tend to the advantage of their client, but the administration of justice ought not to be interfered with on mere pretexts." We agree. And we cannot further allow the abuse of the post-conviction relief statute to obstruct the course of justice.

The sole issue in this proceeding is whether petitioner was denied effective assistance of counsel during his retrial on the charges of deliberate homicide, aggravated kidnapping and robbery.

Petitioner's amended petition alleges ineffective assistance of counsel in numerous particulars. We will discuss these allegations item by item.

Petitioner alleged that Adams did not consult with petitioner regarding his case until January 7, 1978, and did not have time to adequately prepare the case.

In December, 1977, petitioner asked that other counsel be appointed to represent him because he felt that John L. Adams, Jr., did not have sufficient time to represent him in his retrial. In response, the prosecution also requested that a hearing be held and that it be determined that petitioner be satisfied with his counsel, not only as to the time such counsel could devote to the matter, but also in view of the fact that such counsel had represented another defendant in the first trial.

A hearing was held with the following result:

"THE COURT: Court will be in session. We have Big Horn County Criminal Cause No. 1107-C, entitled

State of Montana versus Bernard James Fitzpatrick. Mr. Fitzpatrick, you have filed with this Court a request that the Court consider replacing Mr. John Adams as your attorney on the ground that he, being a public defender, has so much to do that he is not able to adequately take care of your case. You have likewise filed a similar request with the Montana Supreme Court and they have responded to you, and to me as well, and then, similarly, the County Attorney of Big Horn County has likewise filed a motion requesting that you be given the opportunity to express yourself on this very point. And so that is why we are convened here this afternoon, Mr. Fitzpatrick. Do you have any statement that you'd like to make to the Court at this time?

"THE DEFENDANT: Yes I do. I filed a motion with this Court and with the Supreme Court that Mr. John Adams was a public defender and did have a heavy caseload and that, but since that filing I have had a talk with Mr. Adams and Mr. Adams is working on my case, and working hard, and I am satisfied with the work and I do feel that – He assures me that his case load isn't too heavy to handle this case, and I'm inclined to believe that it isn't, and I would like to withdraw whatever it is on that, keep Mr. Adams.

"THE COURT: All right, I want to explain to you, the reason I appointed Mr. Adams is because No. 1, he has been in this Court a good many years and I know he is completely competent; No. 2, he has already been through this case once and so he's familiar with all the details so he can be of more help to you quicker and easier than anybody else I could find."

Following retrial and sentencing, petitioner wrote to Adams expressing his displeasure with Adams' representation of him. He later wrote Adams advising that a lot of what he had said was not true and that "you are a very competent lawyer and you were more than competent at my trial."

At the evidentiary hearing, petitioner advised that the reason he recanted was only to keep his counsel on the case during its appeal to the Montana Supreme Court. Following the decision of the Montana Supreme Court which was unfavorable to the petitioner, he again returned to his accusations of incompetency.

To put these accusations in the proper perspective, it is crucial to understand that petitioner is comparing the final result of his retrial to that of the result of the second trial of defendant Radi which preceded petitioner's trial by several weeks. Defendant Radi was acquitted on all counts.

The thrust of petitioner's argument is two-fold: first, that evidentiary material which was presented on behalf of Radi was not used in petitioner's retrial; second, that defense counsel did not call certain specified witnesses additional to those used by Radi, which petitioner listed for his counsel as being able to support his alibi defense.

As to the Radi trial evidence, it is apparent that petitioner believes it should have been identically presented in his retrial, without regard to other considerations. Since petitioner contends he was with Radi, and since Radi was acquitted, petitioner believes he should have been acquitted also. Petitioner also obviously believes, regardless of other factors, that the use of additional witnesses which were not called at his retrial would have resulted in his acquittal. Since Radi was acquitted and shortly thereafter petitioner was convicted, petitioner concludes that the cause of his conviction was an inadequacy on the part of his defense counsel.

Petitioner conveniently overlooks the fact that the key witnesses in the prosecution's case at the Radi trial failed to appear and testify in person and consequently, the prosecution was forced to rely upon evidence offered by casual observers who had knowledge of various aspects of the events. The key witnesses were available for Fitzpatrick's retrial and this circumstance alone is more than adequate to explain the differing results of the two trials.

The allegations with regard to petitioner's contention that additional witnesses should have been called will be discussed witness by witness.

Dennis Sasich: Petitioner's amended petition states that Sasich "could have testified that he saw Radi at the Squire Lounge in Billings on the evening of April 4th or 5th, 1975, and that he saw petitioner in that same place with Radi around the same time." At Radi's trial, this witness could not conclusively state that Radi was in the Squire Lounge on April 5th. At the evidentiary hearing held on Fitzpartick's amended petition, Sasich appeared and testified in effect that he had never seen petitioner before.

The witnesses used by counsel on behalf of petitioner at trial were two cocktail waitresses from the Squire Lounge, Shirley Graham and Gloria LeVe. Graham testified that petitioner's female companion, Christine Fetters, was seen by her in the Squire Lounge on the night of April 5 and that petitioner could have been with her although Graham did not specifically recall seeing him. LeVe's testimony placed both Fetters and petitioner together in the Squire Lounge at that time. Obviously, the

witnesses selected by counsel to testify on behalf of petitioner were much stronger than a witness who did not even know petitioner.

Barbara Hansen (Radi): Petitioner's amended petition states that this witness and Radi were "with Fitzpatrick at several points during that afternoon and evening in bars in Billings . . . "

Her testimony at the Radi trial as to the events of April 5 was not confirmed by another member of the party, Shelley Beaumont, who was also called as a witness.

At the evidentiary hearing, Ms. Radi augmented her testimony and further modified it on cross-examination. She further stated that while she is friendly to petitioner now, in 1978 he was a stranger to her and she did not want to be a witness for him or be involved in his trial in any way. By the time of petitioner's trial she had left Montana, and the investigator assisting Fitzpatrick's counsel determined that she was somewhere in Idaho but was unable to contact her. She had a pattern of using different names at different times and the search was discontinued.

It appears from the testimony of this witness in the Radi trial that on the night in question she had used marijuana, LSD and alcohol and was, in her own words, "a mess."

At the time of the homicide she was a prostitute working in Nevada but home on vacation living with Radi in a "hustler" relationship.

Defense counsel had listened to some of her testimony in the Radi trial and had observed her demeanor on the stand. He judged her effect upon the jury as being detrimental and was not impressed with her credibility.

Given the totality of the atmosphere which accompanied the appearance of this witness, it cannot be said that it was an exercise in incompetency to have doubts about her predictability and veracity, particularly if she were to be an unwilling witness.

Herschel Wilson: Petitioner alleged in his amended petition that this witness could have testified that the petitioner was in Billings on the evening of April 5.

This witness did not testify at the Radi trial and was intoxicated at the evidentiary hearing. He could only testify that he saw petitioner in the Standard Bar with a girl from Butte shortly after petitioner was released from prison. This witness could not and did not testify that petitioner was in Billings at the time the crime occurred in Hardin. It clearly cannot have been a lack of competency to have failed to call this witness.

Cheryl Wilson (originally alleged as "Jackie Wilson"): In his amended petition Fitzpatrick states that this witness could have testified that petitioner was in the Standard Bar on April 5, 1975.

This witness did not testify at the Radi trial but did appear at the evidentiary hearing. Her testimony was that she had never seen petitioner prior to the evidentiary hearing. She testified that she and Herschel Wilson had been involved in a five-day drinking party at about the time of the homicide in 1975.

Edna Torske: In his amended petition, Fitzpatrick alleged that Torske could place him in the Standard Bar on the night of April 5 because of a fight which had occurred and which she had discussed with him.

Torske did not testify at the Radi trial but did appear at the evidentiary hearing. She testified that she did see petitioner at the Standard Bar two or three times after he got out of prison but did not know whether it was during the day or night, on a week day or weekend, but at any rate could not have been later than 9:00 p.m. because that is when she got off work.

She had been contacted even before the 1975 joint trial and, at first, was encouraging to the defense in what she would say. Shortly thereafter, however, she concluded that she had been mistaken in her memory and stated that she wanted to be left alone. She was uncooperative with everyone and, at the time of the 1978 trial, refused to testify voluntarily when contacted by defense counsel. She told counsel that she could not remember and also stated that the fight she does remember did not occur on the day of the murder. She felt that petitioner was trying to use her improperly. Defense counsel decided that she would be unable to support the alibi defense and consequently did not call her. It is not an act of incompetency to refuse to call an unfavorable witness. In addition, it developed at the evidentiary hearing that, by petitioner's own admission, the fight in question was on April 4, not April 5, and this was confirmed by a complaint and report from Billings Police Department records. Clearly, Torske was justified in refusing to verify petitioner's allegations and Adams was justified in declining to call this witness.

Don Collett and Laurel Collett: Petitioner alleges in his amended petition that these two parties could place him in Billings on April 5, 1975.

Neither of these witnesses testified at the Radi trial. Don Collett did appear at the evidentiary hearing but was intoxicated and left the courtroom before he could be called as a witness. He could not be found after he left so his testimony was not taken. However, the paralegal that spoke to him in preparation for the hearing advised that Mr. Collett's recollection was even worse than that of Herschel Wilson.

Laurel Collett's testimony was taken by deposition while she was hospitalized. She testified that she saw petitioner with Radi in the Standard Bar at some time between 6:00 p.m. and 2:00 a.m. for a brief period of time on the night of the murder.

Harriet Torgerson: The amended petition states that this witness could testify that petitioner checked into the Ponderosa Inn Motel before 2:00 or 3:00 a.m. on April 5, 1975.

The witness did not appear at the Radi trial. At the evidentiary hearing, she testified that she checked petitioner in "towards morning." She could not be more specific regarding the exact time, except that she was certain it would have been later than 3:00 a.m. and could have been as late as 5:00 or 6:00 a.m. with the room receipt still dated April 5, 1975. It was her practice that the date change was not made until after she checked the books for the previous day. This witness's testimony supports the prosecution's case rather than contradicts it as alleged in petitioner's amended petition. It can hardly be

ineffective assistance for counsel to decline to call a witness which he knew would support the prosecution.

Christine Fetters: Petitioner contends that this witness's testimony was impeachable in a number of ways. Petitioner alleged that Fetters' children had been taken from her and she was being threatened with being deprived of their custody by the State. For this reason, she testified, according to petitioner, for the State. Fetters denied this at the evidentiary hearing, and petitioner did not offer any evidence in support of this allegation.

Fetters' evidence regarding burial of the gun was also impeachable according to petitioner. However, at the evidentiary hearing, her testimony was confirmed.

Her testimony regarding the financial position of petitioner and herself also was not impeached at the hearing. Petitioner alleged that a witness named Robert Miller could testify that he loaned petitioner a sum of money. Robert Miller could not be located either for the trial or the hearing, and it was noted that "Robert Miller" was a pseudonym sometimes used by petitioner.

Witnesses were presented on Fitzpatrick's behalf at the trial to testify to his financial condition. Petitioner himself testified that he made money through the sale of drugs shortly after his release from prison.

At the hearing, Fetters did amend her testimony somewhat as to the date she heard the radio announcements of the Dyckman murder.

Petitioner characterized Fetters as a "surprise" witness. In actuality, she had been listed by petitioner before the trial as one of his alibi defense witnesses. As trial

approached, however, both defense counsel and the investigator ascertained that she would be an undesirable witness and that her testimony would not be favorable to petitioner.

At the 1978 trial when the State sought to call Fetters as a prosecution witness, defense counsel objected on the basis that she was a defense witness and could have been in a common-law marriage relationship with petitioner.

In summary, the evidence does not support petitioner's allegations that the testimony of Fetters was readily impeachable.

Iva Lee Finch and Cindy Lee Morgan: Petitioner alleges that defense counsel failed to adequately bring out the effect of LSD upon these witnesses. However, the trial transcript demonstrates that this area was adequately covered.

Robyn Vandersloot Spaulding: Petitioner alleges that this witness could have testified as to the hair colors and styles of the two individuals she observed with Dyckman. At the evidentiary hearing, she testified that she could describe neither the styles nor the colors but that neither of the individuals with Dyckman were Fred or Raleigh Kraft, two men at whom petitioner was attempting to cast suspicion.

Kenny Elms and Jim Doane: Petitioner alleges that these witnesses could have testified regarding the car seen following the Dyckman vehicle. This evidence was covered by three other witnesses and would only have

been repetitive. Further, the automobile identification testimony was emphasized in cross-examination of Sheriff Brown and Lyle Doane and in the Ronald Potts testimony.

Art Mulkey: The prosecution contended that the car seen following the Dyckman vehicle was Radi's. Radi's car was a 1971 Pontiac with single headlights, a vertical configuration in the grill area and oblong taillights. The total effect of the testimony elicited by Fitzpatrick's counsel at trial, through the witnesses Effie and Everett Knows the Ground and Monte Doane, was that in the car they saw following the victim's car the headlights were dual (Doane) and the taillights were round (Everett). Consequently, the testimony developed at the trial regarding the car following the Dyckman vehicle was to Fitzpatrick's benefit. Mulkey's testimony, if he had agreed to return from Georgia and testify as to the differences in appearance between Radi's car and the car described by Doane and Everett and Effie Knows the Ground, would simply have reiterated other testimony.

Edwin Bushman: Petitioner alleges that the testimony of this key prosecution witness could have been impeached regarding where the victim was depositing the Safeway receipts. This allegedly could have been accomplished by calling Everett Stoltz. In fact, Stoltz did testify and that point was covered both on direct end cross-examination.

Petitioner also contends that suspicion could have been directed at Bushman if Larry Cole, the defense investigator, had been called to testify regarding the time it took to drive from the Post Office to Toluca and back to the Post Office. This point was brought directly to the attention of the jury in defense counsel's presentation of Sheriff Brown's testimony.

Raleigh Kraft: Petitioner alleges that this witness's testimony could have been impeached as to when he learned of the murder. It is clear that petitioner misread the Fred Kraft statement by interpreting it to mean that Fred Kraft had not heard of the crime prior to the discussion with Bushman.

Ronald Potts: Petitioner alleges that defense counsel failed to bring out prior inconsistent statements of this witness with regard to the car he saw parked in front of Safeway. Defense counsel questioned this witness on both direct and cross-examination, and the questioning covered this point, among others.

Irene Girard and Barbara Howell: Petitioner alleges that these two witnesses should have been called to verify that they had sent him money. The depositions of these witnesses were taken for presentation at the evidentiary hearing, and they testified that Girard had sent $50 and Howell $20 in May or June, 1975.

Petitioner alleges that certain records could have been presented regarding the issues.

The minimum amounts sent by Girard and Howell are not significant in terms of the total financial picture.

Also these items were not at issue as Christine Fetters had already testified as to their receipt.

With regard to the Snelling & Snelling employment records, the record demonstrates that there was never any issue that petitioner applied for work through this agency.

Ken Greene: Petitioner alleges that Greene, an attorney working with the Defender Project at the Montana State Prison, could have testified that he had advised Fitzpatrick shortly before Fitzpatrick's release from prison that if Fitzpatrick did not leave the state he would be constantly picked up as a suspect and charged with crimes committed where Fitzpatrick resided. Petitioner contends that this testimony could have countered any prosecution claim that petitioner's departure circumstantially indicated guilt. Defense counsel considered this testimony irrelevant as the record shows that petitioner stayed in Butte and also repeatedly made trips to Billings after the murder. If defense counsel had presented this testimony, it would have been apparent that petitioner had not left the state for any significant period of time after release from prison.

Larry Cole: Petitioner alleges that defense counsel erred in not calling this witness, the defense investigator, regarding the chain of custody of the Radi vehicle. Cole and defense counsel discussed the possibility of Cole testifying and decided against it. Petitioner's defense was alibi, so there was a question of relevency with respect to matters concerning the Radi vehicle. If petitioner were

not in Hardin the night of the crime, which was petitioner's defense, the contents of the Radi vehicle weeks later would be immaterial to him.

Robert McRae: Petitioner maintains that this witness should have been called to testify regarding a shell casing found in the Radi vehicle. Cole contacted McRae and discussed his testimony. It was decided not to have McRae testify as his testimony would not be germane to the alibi defense.

Forensic Evidence from the Murder Scene: Petitioner alleges that negative results of tests should have been presented. The transcript shows that such evidence was covered in the cross-examinations of Sheriff Brown and Carl Zarndt, an FBI agent.

Further Evidence: Petitioner alleges in his amended petition that there was further evidence, presumably favorable to petitioner, which defense counsel failed to present. No such further evidence was presented to the court at the evidentiary hearing.

Insufficient Defense Legal Research: These generalized allegations have, for the most part, already been discussed and ruled upon in the District Court's prior order dismissing Fitzpatrick's petition, which order has been affirmed by the Montana Supreme Court.

Insufficient Trial Preparation: This contention was discussed in the findings of fact and conclusions of law previously issued on January 7, 1981, in which, at page 20, the District Court stated:

> "At the outset, petitioner attempts to show that there was insufficient defense preparation at, and prior to

> trial. Omitted from the 'facts' is recognition that defense counsel had served as counsel for a codefendant in the first trial of this cause and already had detailed familiarity with the case, so that there is no significance to be presumed from the facts alone surrounding the date of his appointment to serve this petitioner, or the date upon which inception of consultation with the petitioner commenced. The facts which petitioner relies upon to support his claim of insufficient defense preparation are merely conclusory allegations and, as such, are insufficient."

The only item of evidence offered in this connection at the evidentiary hearing was Exhibit AF, purporting to show that defense counsel, during December 1977 and January and February 1978, was burdened with a total of forty-seven pending criminal cases. The point is that, being so burdened, he was unable to properly prepare for petitioner's trial.

Exhibit AF is a classic example of how a case load listing, by itself, can be deceptive and misleading. As examples, Case No. 10259 was actually closed as to Adams in May 1977 and was still alive in December 1977 only because of the existence of a codefendant represented by other counsel. The same is true of Case 10332. Case 10449 was closed on December 1, 1977. Case 10461 was dismissed December 5, 1977. Case 10491 was completed December 5, 1977, and 14089 was completed on December 19, 1977. Adams withdrew from 10460 on January 11, 1978, and a guilty plea in 10478 occurred on that same date. Case 10500 was dismissed December 5, 1977, and 10521 was closed on December 1, 1977. Cases 10577 and DC-78-002 were both closed on January 9, 1978. None of these cases involved trial time or trial preparation and the Freeman murder case, which petitioner mentioned in

his testimony, did not go to trial until April 1978. Case 10568, shown as an active case in December 1977 and January 1978, is one in which Adams was not appointed counsel until March 22, 1978, which was after petitioner's trial.

An examination of the records will further show that under the pace of court calendaring, the cases filed subsequent to No. 10557 in which a contest developed would not mature until in April or May 1978, or later. Those which would close earlier would be by way of guilty pleas.

It should also be recalled at this point that defense counsel's case load was a primary issue at the hearing which petitioner requested prior to his second trial. At this hearing on the petition which requested appointment of other counsel, petitioner withdrew his objection to his court-appointed counsel and stated that he thought Adams could handle his case effectively.

It follows that Exhibit AF falls short in its probative effect on the point urged by petitioner.

Sentencing:

Petitioner alleges in his amended petition that defense counsel presented no evidence in mitigation, although such mitigating evidence was allegedly available through his mother, his doctor and hospital records.

At the evidentiary hearing, there was no evidence presented as to any doctor or hospital records relating to treatment of petitioner for dizzy spells and headaches. Petitioner's mother, Irene Girard, whose testimony was taken by deposition, did advise of dizzy spells suffered

by petitioner as a child, resulting in his ears being lanced. However, because of a family break-up, her contact with petitioner was very spotty over the years. She left when he was seven years old and she saw him for a period when he was fifteen, again when he was seventeen, and finally on a brief visit when he was twenty-two or twenty-three years old. She had not seen him since, although petitioner did advise his mother in a telephone conversation at a time when he was confined in the Montana State Prison that he was still having dizzy spells, but the records of the prison made no mention of that fact or of any history of headaches.

At the evidentiary hearing, Chris Fetters recalled that petitioner had told her that he had lied and attempted to use headaches and dizzy spells in the past to excuse his conduct. It is not made clear by petitioner what the relevancy might be with respect to dizzy spells and headaches in connection with the sentencing process. No specificity is provided as to how it could enter into sentencing as a mitigating factor provided by the statutes.

In connection with the deposition of Irene Girard, respondent's exhibit A was attached and discussed as a part thereof. It consists of a questionnaire submitted by the Montana State Prison Reception Unit to Mrs. Girard, seeking background information in connection with petitioner's reception at some time into the state prison. To it is attached a letter written by Mrs. Girard, which outlines the developmental history of petitioner. It mentions petitioner being expelled from school, his membership in a school gang, car thefts, juvenile commitments, attempted escape, A.W.O.L. from the Army on two occasions, acquittal upon a charge of killing a man with his bayonet,

transporting a stolen car across state lines, and going through a period of being "knife crazy," among other significant points.

As the record shows, defense counsel was well acquainted with Fitzpatrick's history and had known him since the early 1960's. Given Fitzpatrick's criminal history and considering counsel's duty to avoid misleading the court, any approach taken by Adams during the sentencing hearing, other than the approach he reasonably selected, would have had substantial and hazardous pitfalls.

The remaining areas touched by petitioner's allegations of performance of defense counsel at sentencing appear to already have been considered and ruled upon both by the District Court and this Court in prior proceedings.

Defense counsel did admit at the evidentiary hearing, in connection with the sentencing phase, that one mistake was made – namely, that he informed the court that the slaying of Alfred Falcon in the Montana State Prison was a matter of self-defense, when, in fact, petitioner denied having committed it at all. Petitioner had originally been convicted of such charge, which was affirmed on direct appeal but was later overturned in a post-conviction proceeding, resulting in the charges being dismissed. Defense counsel's copy of petitioner's presentence investigation conducted in connection with sentencing at the first trial, and which was found in Chris J. Nelson's file (petitioner's former attorney), did contain notations indicating that petitioner had admitted the prison slaying. At the evidentiary hearing, Nelson indicated that part of his

sentencing strategy was to point out that, although petitioner admitted previous crimes, he maintained his innocence in this case, thereby fortifying his attempt at credibility. This notation could have misled defense counsel at the time of sentencing on the retrial in 1978.

At the evidentiary hearing, the witness Christine Fetters did testify that petitioner had made admissions to her saying that, with respect to the murder of Alfred Falcon, it was something that had to be done because he was a beast and was taking over the prison. In view of this the slip of defense counsel in saying it was a matter of self-defense casts petitioner's relationship with the incident in more favorable light than what the prosecution could possibly have presented if it became a contested point.

Defense Counsel John L. Adams, Jr.:

Adams graduated from the University of Montana Law School in 1954. He became a Deputy County Attorney in Billings, Montana, in 1956, and County Attorney in 1965. He served as County Attorney until 1970. From 1970 to the present he has served continuously as court-appointed defense counsel in the District Court. His legal work has been almost exclusively in the field of criminal law and he has tried at least 200 felony cases, including several capital cases.

During the first trial of the codefendants, Adams was appointed to represent Paul Bad Horse. He was assisted in his representation of Bad Horse by Jerome Cate, who was selected by the Indian tribe.

After Adams was appointed counsel to Fitzpatrick for the second trial, he discussed Fitzpatrick's case with Chris Nelson, Fitzpatrick's attorney during the original trial. In addition, Nelson gave Adams most of his work product, including witnesses' statements. Nelson had withdrawn from representing Fitzpatrick during the second trial because he had recently joined a firm which included Mr. Sinclair, a co-prosecutor in the first trial.

Adams furnished Fitzpatrick with much of the original file and later supplemented it. In addition, he and Fitzpatrick went over the notes and material Fitzpatrick provided.

Adams was assisted in the defense by Larry Cole, the court-appointed special investigator, who was at that time an attorney licensed in Wyoming and awaiting licensing in Montana.

After defendant Radi was acquitted on retrial, Adams discussed the case with Mr. Stephens, Radi's counsel, and was given some of Stephens' case material.

Adams has known Fitzpatrick since the 1960's and made an appearance once as prosecutor in a previous charge against him. Adams has defended Fitzpatrick on other charges at least twice.

In 1972, Adams represented Fitzpatrick on "burglary, drugs and other offenses." Prior to the 1978 trial, Adams also represented Fitzpatrick when he was charged with assault involving a weapon which resulted in Fitzpatrick's imprisonment.

Prior to the second trial, Adams filed a number of motions on petitioner's behalf, including a motion to

limit any testimony of Gary Radi, a notice to rely on the defense of alibi listing thirty-seven witnesses, a supplement to the alibi defense, discovery motions, a motion to dismiss, a motion for appointment of a special investigator, a motion for a change of venue, and a subsequent motion, submitted at petitioner's request, to withdraw the motion for change of venue. In addition, Adams requested that a number of subpoenas and subpoenas duces tecum issue on behalf of Fitzpatrick and responded to the State's motion for production of evidence. Additional motions were submitted by defense counsel prior to trial and a brief relating to the testimony of Edwin Bushman was submitted during the course of the trial. At the conclusion of the trial, Adams submitted fifty-seven jury instructions for the court's consideration.

Conflict of Interest:

Petitioner asserts that because defense counsel had represented Bad Horse at the first trial, a conflict of interest existed in that counsel could not attempt to shift suspicion from Fitzpatrick to Bad Horse. However, as a result of the first trial, Bad Horse had been acquitted of the charges of deliberate homicide and aggravated kidnapping. Clearly he cannot be tried again for those same charges in this case. Consequently, we find petitioner's argument totally without merit.

We note that at no point in the allegations of the petition or amended petition which served as the basis of the evidentiary hearing below did petitioner or his counsel allege conflict of interest as a basis for the charge of ineffective assistance of counsel. At the hearing prior to the 1978 retrial, petitioner indicated he was satisfied with counsel and wanted to withdraw his petition to have

Adams removed from the case. The issue of conflict of interest was not raised on the appeal of petitioner's second conviction. As noted previously, it was not included in petitioner's list of allegations which prompted the evidentiary hearing. Now it appears. It cannot be that petitioner has suddenly become aware of such a charge. In *Petition of Fitzpatrick* (1970), 154 Mont. 512, 464 P.2d 507, an action filed by defendant pro se in this Court, Fitzpatrick raised the issue that he was denied his right to counsel when certain incriminating statements were made by him to police following a shooting.

Petitioner was next before the Montana Supreme Court on the direct appeal of his conviction for the second degree murder of Alfred Falcon. *State v. Fitzpatrick* (1973), 163 Mont. 220, 516 P.2d 605. That appeal was unsuccessful. Subsequently, petitioner filed a pro se petition for a writ of habeas corpus in this Court the following year. The issue in that case was that Fitzpatrick's alibi defense had been hampered by a delay in appointment of counsel. This inaction on the part of the State was found to have deprived Fitzpatrick of effective representation by counsel.

Given Fitzpatrick's extensive prior experience in the criminal courts and right-to-counsel issues, his statements that he abandoned his early attempts to have Adams removed as his counsel because he feared being left without counsel on this capital case are without merit.

Further, after thorough review of the entire file in this matter, it is clear that petitioner's allegation of conflict of interest is also without merit.

Ineffective Assistance of Counsel:

The standard of review for ineffective assistance of counsel claims within this jurisdiction is known as the "reasonably effective assistance" test and may be stated as follows: "Persons accused of crime are entitled to the effective assistance of counsel acting within the range of competence demanded of attorneys in criminal cases." In order to find ineffective assistance of counsel, the errors made must be "errors a reasonably competent attorney acting as a diligent conscientious advocate would not have made, for that is the constitutional standard." *Cooper v. Fitzharris* (9th Cir. 1978), 586 F.2d 1325, cert. denied, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979).

In addition, when the claim of ineffective assistance of counsel rests upon specific acts and omissions of counsel, relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct. *Cooper*, 586 F.2d at 1331.

Further, "claimed inadequacy of counsel must not be tested by a greater sophistication of appellate counsel, nor by that counsel's unrivaled opportunity to study the record at leisure and cite different tactics of perhaps doubtful efficacy. Success is not the test of efficient counsel, frequently neither vigor, zeal, nor skill can overcome the truth." *State v. Forsness* (1972), 159 Mont. 105, 110, 495 P.2d 176, 179. And, " . . . Hindsight cannot now be used to say what perhaps could have been done to achieve a possible but highly speculative result . . . " *State v. Noller* (1963), 142 Mont. 35, 38, 381 P.2d 293, 294.

Petitioner contends the proper standard for determining ineffective assistance of counsel is that enunciated

in *Washington v. Strickland* (5th Cir.1982), 673 F.2d 879; (Unit B) (en banc) 693 F.2d 1243 (5th Cir. 1982), cert. granted, June 6, 1983. The *Washington* test is as follows: (1) petitioner has the burden of proving that his right to effective assistance of counsel was violated; (2) then petitioner must establish prejudice that worked to his actual and substantial disadvantage; and (3) a writ must be granted unless state proves counsel's ineffectiveness was harmless beyond a reasonable doubt. Petitioner has the burden to demonstrate not only a *possibility* of prejudice but that it worked to his actual and substantial disadvantage. *Washington*, 693 F.2d at 1258.

Washington also recognizes that certain lines of defense may be contradictory and thus incapable of being presented persuasively in tandem. *Washington*, 693 F.2d at 1253. Such was the case here. Petitioner alleges in his amended petition that certain witnesses should have been called to testify regarding certain evidence found in Radi's vehicle. To call such witnesses and elicit such testimony would have been totally incongruent with petitioner's alibi defense.

Even under the *Washington* analysis, it is presumed that an attorney is competent and has rendered effective assistance. We have reviewed the voluminous record in this case and the extensive and superb memorandum prepared by the District Court Judge which accompanies the order dismissing petitioner's amended petition. We find that even under the *Washington* analysis, petitioner has failed to meet his burden.

The State of Florida has sought and been granted a writ of certiorari from the United States Supreme Court

regarding the *Washington* case. Florida has adopted the analysis seen in *Knight v. State* (Fla.1981), 394 So.2d 997, and *United States v. DeCoster* (D.C.Cir.1979), 624 F.2d 196. *Knight* requires: (1) specific omissions/acts must be detailed in an appropriate pleading; (2) defendant has burden of proof to show substantial and serious deficiency measurably below the performance of competent counsel; and (3) that within the circumstances of the case, the prejudice was so extensive that there was a likelihood it affected the outcome of the case. (4) The State then has an opportunity to rebut by showing beyond a reasonable doubt that there was no prejudice.

Even under the *Knight/DeCoster* standard, petitioner here has failed to meet his burden of proof. A review of the record of this case clearly shows that petitioner has failed to meet any standard argued by his counsel.

An additional element in this case is the concept of waiver. Montana recognizes that a defendant may waive a potential conflict of interest. *State v. Gallagher* (1972), 162 Mont. 155, 161, 509 P.2d 852, 855. In determining whether such a conflict has been waived, it is necessary to consider the facts and circumstances surrounding the case, including the background, experience and conduct of the defendant. *United States v. Partin* (9th Cir.1979), 601 F.2d 1000. We hold there was no conflict here; however, even if there had been a possible conflict of interest issue, petitioner has waived his right to raise such an issue by his conduct and statements at the pretrial hearing regarding possible appointment of other counsel, by his failure to broach the subject at trial and/or on appeal, and by his knowledge from the outset that his counsel had defended

a codefendant during the first trial. Critical to this determination is the fact that this petitioner is extremely knowledgeable of the criminal justice system and has argued ineffective assistance of counsel issues in the past.

Petitioner has attempted to show that a per se conflict in interest existed in counsel's defense of Bad Horse in the first trial and of petitioner Fitzpatrick in the second trial. However, the authorities cited fail to support this contention.

Petitioner also suggests a different standard should apply in capital cases. We decline to set a separate standard for judging effective assistance of counsel in a capital case. The reasons for refusal are well expressed in *Washington v. Watkins* (5th Cir.1981), 655 F.2d 1346, 1357:

> "Innumerable practical problems would be presented by such a holding. For example, since effective assistance is not judged by hindsight, the heightened standard would have to apply to all cases in which a capital offense was *charged*, regardless of whether the jury subsequently convicted the defendant of a non-capital offense or refused to impose the death penalty in a capital case. Recognition of a 'sliding scale' for this constitutional standard would also suggest, for example, that a defendant charged with aggravated assault would be entitled to a more effective lawyer than one charged with simple assault or public intoxication. We decline to embark on such a treacherous path."

We agree. Our research has failed to disclose any case from any jurisdiction which has held that there is a constitutional requirement of a separate and higher standard for assistance of counsel in capital cases.

In conclusion, we find that, regardless of the tests advocated by petitioner, he has failed to support his allegation of ineffective assistance of counsel. Consequently, we hereby affirm the District Court in dismissing petitioner's amended petition.

HARRISON, GULBRANDSON and WEBER, JJ., and ARNOLD OLSEN, District Judge,* concur.

MORRISON, Justice, specially concurring:

I concur in the result. However, I do believe that Mr. Adam's representation of Mr. Bad Horse created a potential conflict of interest. My vote to affirm is based upon waiver on the part of petitioner, Bernard Fitzpatrick.

SHEA, Justice, dissenting:

This is a death penalty case, and I remain convinced that defense counsel did not do all that he could do, and not even all that he should have done. For example, based on my previous dissents relating to the prejudicial and inconsistent jury instructions and jury verdicts, to which defense counsel did not object, a basis exists to reverse the conviction not only for the legal error inherent in the instructions and verdict forms, but also for the failure of defense counsel in a capital case to be more careful about the instructions and verdict forms on which a death penalty may ultimately be based.

Therefore, I would order a new trial.

* Sitting in place of *SHEEHY*, J.